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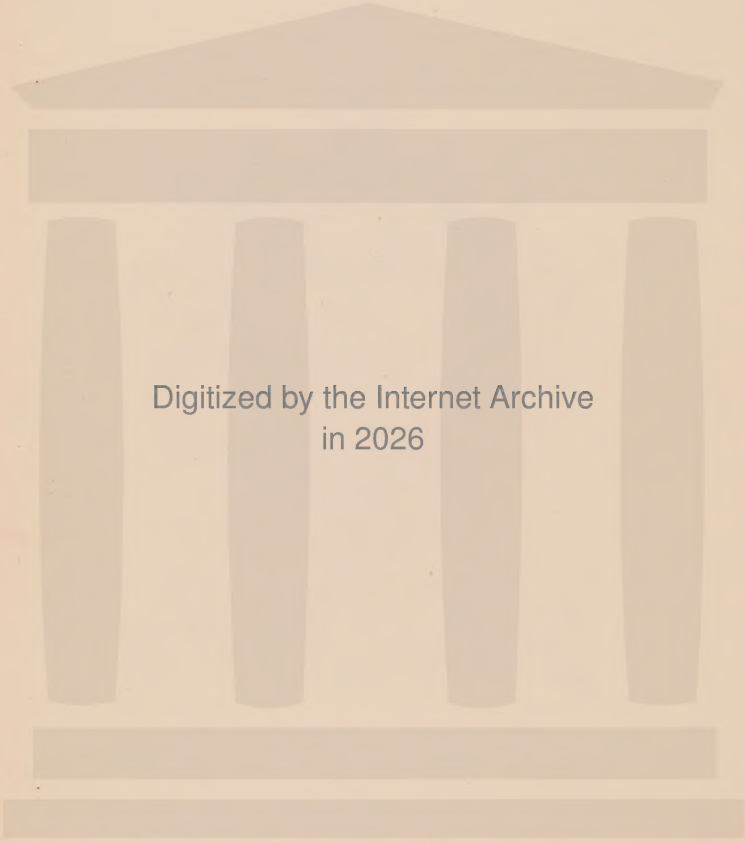
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1924.

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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

[IN THE COURT OF APPEAL.]

C. A.
1923
July 23, 24.

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Husband and Wife—Divorce—Husband's Petition on Ground of Wife's Adultery —Birth of Child—Paternity—Husband's Denial of Marital Intercourse— Admissibility—Evidence Further Amendment Act, 1869 (32 *&* 33 *Vict. c.* 68), *s.* 3.

In a suit for divorce on the ground of the adultery of the wife the jury found that she had committed adultery with an unknown man, resulting in the birth of a child, and the judge pronounced a decree nisi. The verdict and judgment were based on the evidence of the husband that, although he admitted having occupied the same bed with his wife at a date when conception of the child was normally possible, he had not in fact on that occasion, nor at any time at which in the course of nature the child could have been conceived, had marital intercourse with her:—

Held, that the evidence was properly admitted.

APPEAL from a decree nisi for divorce against the respondent, pronounced by Hill J. at the trial with a special jury.

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By his petition the petitioner, the Hon. John Hugo Russell, alleged that the respondent, Mrs. Russell, had committed adultery with the co-respondent Edgar Jacquard Mayer, and also with a man unknown resulting in the birth of a child on October 15, 1921, of which the petitioner alleged that he was not the father. By their answers the respondent and co-respondent denied these allegations.

In a former action the petitioner had alleged adultery by the respondent with two other men. In that case after a trial in July, 1922, before Sir Henry Duke P. and a special jury the petition was dismissed and the two co-respondents were dismissed from the suit with costs. The charge of adultery with a man unknown was also before the Court on that occasion, the jury disagreeing with regard to it.

The parties were married at St. Jude's Church, Kensington, on October 18, 1918.

The petitioner gave evidence to the effect that there had been a pre-marital agreement between the respondent and himself that for some time at least there should be no children of the marriage, and that in accordance with that agreement he had never had complete intercourse with her, though he admitted that on numerous occasions there had been partial intercourse. He also admitted that on certain occasions, particularly on December 18 and 19, 1920, he had slept in the same bed with the respondent. He however denied that on those occasions marital intercourse of any kind had taken place, or at any time later than August, 1920. At the trial counsel for the respondent objected that the petitioner's evidence as to non-intercourse was inadmissible on the ground that the evidence of either husband or wife which tended to bastardize a child conceived and born in wedlock was contrary to decency, morality, and public policy. Hill J. overruled the objection on the ground that there was no authority for excluding such evidence though the weight to be given to it must be the subject of consideration.

At the trial the jury found that the respondent had not committed adultery with the co-respondent, nor he with her, and he was accordingly dismissed from the suit with

costs. They further found, however, that the respondent had committed adultery with a man unknown, and Hill J. pronounced the decree nisi from which the respondent now appealed.

The grounds of the appeal were that the learned judge had misdirected himself, that the verdict was against the weight of the evidence, and that as the parties had admittedly occupied the same bed in December, 1920, at a date when the conception of the child was normally possible, the petitioner was not entitled under the existing law to give evidence to the effect that no marital intercourse had occurred, so as to deny the paternity of the child.

The case is only reported upon the point as to the admissibility of the evidence in question.

Patrick Hastings K.C., D. Cotes-Preedy, F. J. de Verteuil and *T. J. O'Connor* for the appellant. According to the law of England it is not permissible for a husband or a wife to give evidence of non-intercourse, so as to prove that a child born in wedlock is not a legitimate child.

Before the passing of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), the law as to the competency of persons to give evidence was as follows: The old rule was that the parties most interested in the suit were not admissible as witnesses. This rule was first altered in 1833 by 3 & 4 Will. 4, c. 42, which, by s. 26, enabled witnesses interested solely on account of the verdict to give evidence. That was extended in 1843 by 6 & 7 Vict. c. 85, which provided, by s. 1, that no person offered as a witness should be excluded by reason of incapacity from crime or interest from giving evidence; but parties to the suit were still excluded. In 1851 the evidence of parties to a suit was for the first time made admissible by s. 2 of 14 & 15 Vict. c. 99, save in the case of proceedings instituted in consequence of adultery which were specially excepted by s. 4. The Act of 1853 (16 & 17 Vict. c. 83), by s. 1, dealt with husbands and wives being parties to suits, and put them in the same position as other persons, save, again, in divorce proceedings. By the

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Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), which is material in the present case, it is provided by s. 3 that "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding." That provision does not abrogate the long-established rule that the evidence of a husband or wife is not admissible to show that a child born in wedlock is not legitimate.

[LORD STERNDALE M.R. I should say its effect is to make a husband and wife competent witnesses on any matter that is relevant to the issue that has to be tried, subject to the ordinary rules of evidence.]

The question is whether the rule which has prevailed in bastardy cases extends to proceedings for divorce, and it is submitted it does. The principle underlying the old doctrine is that it is contrary to public policy to allow the husband or the wife to give evidence to the effect that the offspring is illegitimate because there has been no marital relationship. In the present case Hill J. stated it was the well-established practice of the Divorce Court to allow such evidence to be given. It is submitted, however, that this is not the practice. If it were so, any husband who wished to get rid of his wife would only have to allege that there had been no marital intercourse and the jury would then have to judge between his evidence and that of his wife. The policy of the law is not to allow, on grounds of decency, morality and public policy, a husband or a wife to deal with delicate matters of domestic relationship in this way.

In *Goodright* v. *Moss* (1) it was held that the evidence of the parents was not admissible to bastardize the issue. Lord Mansfield there said: "As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious." And this principle is laid down in similar

(1) (1777) 2 Cowp. 591, 594.

terms by Lord Denman C.J. in *Rex* v. *Inhabitants of Sourton*. (1)

In *The Aylesford Peerage* (2) it was held that where the legitimacy of a child born in wedlock was at issue, previous statements of the mother that the child was a bastard were admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness-box. The House of Lords there had in mind the possibility that the rule in *Rex* v. *Inhabitants of Sourton* (3) did not apply now that under the Act of 1869 the husband and wife could give evidence in divorce cases.

In *Hawes* v. *Draeger* (4) Kay J., referring to the rule, said: "But it must be remembered that the husband and wife are not allowed to give evidence on the question of non-access, and therefore it is impossible to prove that there was no access." It is true that that was a legitimacy case, but it is submitted that the rule is not limited to those cases.

[They also referred to the judgment of Lord Halsbury L.C. in *The Poulett Peerage*. (5)]

There are three or four cases in which the question whether the admissibility of this evidence has been affected by the Act of 1869 has arisen. The first is *In re Rideout's Trusts* (6), where the Court, notwithstanding the enactment in s. 3 of the Act of 1869, required corroboration of the husband's evidence as to non-access. In *In re Yearwood's Trusts* (7) the judge does appear to have thought that the Act of 1869 had affected the old rule. But it is submitted that there is nothing in the Act which impugns it. In *Nottingham Union* v. *Tomkinson* (8) the point was again discussed; see also *Burnaby* v. *Baillie*. (9)

One of the earliest cases in which the question was discussed was *Rex* v. *Reading* (10), which was a bastardy case. The

(1) (1836) 5 Ad. & E. 180, 188.
(2) (1885) 11 App. Cas. 1.
(3) 5 Ad. & E. 180.
(4) (1883) 23 Ch. D. 173, 178.
(5) [1903] A. C. 395, 398, 399.
(6) (1870) L. R. 10 Eq. 41.
(7) (1877) 5 Ch. D. 545.
(8) (1879) 4 C. P. D. 343.
(9) (1889) 42 Ch. D. 282.
(10) (1734) Cas. temp. Hardwicke, 79, 380.

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question there arose as to the competency of the wife to give evidence. That case seems to suggest that if you cannot prove the bastardy in any other way you can prove it by the evidence of the wife. That case was referred to in *Rex* v. *Rook.* (1)

[WARRINGTON L.J. In those cases the question of the admissibility of the evidence did not arise. The question was as to the competency of the witness.

SCRUTTON L.J. referred to *Rex* v. *Luffe.* (2)]

It cannot be contested that, according to the authorities, the husband and wife and each of them is inadmissible as a witness to prove the illegitimacy of a child born in wedlock. The question whether there was intercourse or not is one of fact. Lord Halsbury L.C. in the *Poulett Peerage Case* (3) said: "The question is to be treated as a question of fact, and, like every other question of fact, when you are answering a presumption it may be answered by any evidence that is appropriate to the issue."

And in the *Aylesford Peerage Case* (4) Lord Bramwell said that the rule was a positive rule of law and was not expressly abrogated by statute.

In law therefore the evidence of the petitioner is not admissible: Phipson on Evidence, 6th ed., p. 199; *In re Walker* (5); *In re Rideout's Trusts* (6); *Keys* v. *Keys* (7); *Bosvile* v. *Attorney-General* (8); *Morris* v. *Davies.* (9)

Sir E. Marshall Hall K.C., *Bayford K.C.* and *Hon. Victor Russell* for the petitioner. If this were a legitimacy case the Court would hold the child to be that of the husband: *Bosvile* v. *Attorney-General.* (10) In a case where the issue is adultery it is different: Co. Litt. 244A, *Pendrell* v. *Pendrell* (11); *Rex* v. *Reading* (12); *Goodright* v. *Moss.* (13)

As to the statutory alteration of the law some judges have

(1) (1752) 1 Wils. 340.
(2) (1807) 8 East, 193.
(3) [1903] A. C. 395.
(4) (1885) 11 App. Cas. 1.
(5) (1885) 53 L. T. 660.
(6) L. R. 10 Eq. 41.
(7) (1900) 34 Ir. L. T. 190.
(8) (1887) 12 P. D. 177.
(9) (1837) 5 Cl. & F. 163, 242.
(10) 12 P. D. 177, 179.
(11) (1732) 2 Str. 925.
(12) (1734) Cas. temp. Hardwicke, 79, 380.
(13) 2 Cowp. 591.

thought that the Act of 1869 had abrogated the old rule. In *Nottingham Union* v. *Tomkinson* (1) the contrary was held. But in *Hetherington* v. *Hetherington* (2) Sir J. Hannen P. said that where the issue was adultery the direct evidence of the parties as to the paternity of the child was admissible.

In *Gordon* v. *Gordon* (3) it was held that nothing except evidence that the husband did not have sexual intercourse with his wife at the period of conception can bastardize a child born in wedlock.

In *Gaskill* v. *Gaskill* (4), a case of adultery, the husband was allowed to be called as a witness; see also *Bowden* v. *Bowden* (5); *Roberts* v. *Roberts* (6); *Cramp* v. *Cramp*. (7)

In none of the cases where such evidence was rejected was the issue one of adultery. All the text-books support the contention of the petitioner: Taylor on Evidence, §§ 637, 950; Halsbury's Laws of England, vol. ii, p. 429 (*n*) (*d*); Stephen on Evidence, 10th ed., 127, art. 109; Powell on Evidence, 10th ed., p. 124. If the evidence of the husband be admitted it is decisive of the case. The jury were entitled to take the view which they did.

Cotes-Preedy in reply.

LORD STERNDALE M.R. This is an appeal in a case tried before Hill J. and a special jury in the Probate, Divorce and Admiralty Division. It raises only one question, which is of importance and not without difficulty—namely, whether it is competent in a proceeding for dissolution of marriage on the ground of adultery, for a husband or a wife to give evidence of non-access or non-intercourse in the circumstances of the case. I do not say whether or not, in the absence of that evidence, there might be evidence to support this verdict. I have not read the evidence, and counsel, if I may say so, very properly and wisely, have not

(1) (1879) 4 C. P. D. 343.
(2) (1887) 12 P. D. 112, 114.
(3) [1903] P. 141.
(4) (1921) 38 Times L. R. 1.
(5) (1917) 62 Sol. J. 105.
(6) (1917) 117 L. T. 157.
(7) [1920] P. 158.

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called our attention to the details of it. I do not therefore pronounce any opinion.

[The Master of the Rolls then dealt with certain criticisms upon the summing up of the learned judge, and after considering them came to the conclusion that there had been no misdirection and that no valid complaint could be made against the summing up. He then continued :] The only question, therefore, we have to decide is : was the evidence that the husband gave, that on a certain occasion (I think there were two nights in question) he did not have connection with his wife, admissible or not ? It arises in this way. The husband filed a petition for divorce against his wife, alleging adultery. The case was twice tried. On the second trial the petitioner alleged adultery in two ways : with a named co-respondent, or with a person unknown. The jury found that adultery had not been committed by the respondent with the named co-respondent, and judgment was given for him with costs, and that is out of the question altogether. That leaves solely the question of adultery with a person unknown, and that rested upon this : that the respondent was delivered of a child which the husband said was not and could not be his, because he had had no connection with her at any time which could have produced conception at the time conception in fact took place. If it was open to him to prove that, and if he proved it, adultery was undoubtedly proved. A woman cannot have a child without sufficient connection with some man to produce conception. Therefore if it were open to the husband to prove, and if he did prove, that he did not have connection with her at any time which could possibly have produced the conception and the birth of this child, the inference is irresistible that somebody else had, and that therefore she had committed adultery.

In order to see whether that evidence is admissible or not it is, I think, necessary to consider the legislation with regard to the matter, and also to look at the line of cases (I shall not consider them in detail) which are said to establish the proposition contended for by the appellant—namely, that

in the interest of decency, morality, and policy (I am using the words of Lord Mansfield in *Goodright* v. *Moss* (1)) it is not competent for husband or wife to give any evidence which shows non-access or non-connection. In this case it was narrowed to this: that it is not competent for them to give such evidence where it is shown that the husband and wife have been sleeping together. I do not see anything that confines the doctrine, if it be established, to that narrow compass. It seems to me it must extend considerably beyond that. Various cases were put in argument. Suppose they were not sleeping in the same bed, but in different beds in the same room. Suppose instead of in different beds in the same room, one was sleeping in the bedroom and the other was in bed in the dressing-room, and there was perfect access between the one room and the other. If the principle were to apply it seems to me that it must also apply to those cases as well as to the case where they were, as in this particular instance, actually in bed together. There are no doubt statements as to the objection, from the point of view of decency, morality, and policy, of allowing such evidence to be given. They were made at a time when parties could not give evidence at all, nor could parties interested give evidence when the earliest of those statements were made; but the matter has been changed by legislation. I do not think it is necessary to go into the statutes and say exactly what they provided. The earlier statutes did not allow the parties to a suit to give evidence, although they took away the disability of persons not parties who were interested; but in 1851, by 14 & 15 Vict. c. 99, parties to a suit were enabled to give evidence. By statute two years later, in 1853, 16 & 17 Vict. c. 83, husbands and wives of parties were made competent except in criminal proceedings, or any proceeding instituted in consequence of adultery. Then in 1869 by the Evidence (Further Amendment) Act (32 & 33 Vict. c. 68) the enabling of persons to give evidence was extended still further, and that Act provided after reciting "the discovery of truth

(1) 2 Cowp. 591.

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in Courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery: Be it enacted . . . . The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery." The proviso is of no importance for the purpose of this case. That statute undoubtedly made a very important alteration. It allowed parties to a proceeding instituted in consequence of adultery to give evidence; but I wish to say at once that I agree with counsel for the appellant (and indeed it was not disputed on the other side) that that statute did not make them competent to give any sort of evidence, whether it was according to the rules of evidence or not; it enabled them to give evidence subject to those rules; it put them on the same footing as any other witness, therefore, for instance, hearsay evidence could not be given by those parties, any more than it could by other witnesses. Subject to that it seems to me that the result of making them competent witnesses in a proceeding instituted in consequence of adultery made them witnesses who could give evidence on any matter which was relevant to the issue to be tried, that issue being in this case whether the respondent had or had not committed adultery. No one, I think, can doubt that the evidence which the husband gave in this case was relevant to that issue. I have already stated why it was. I repeat it quite shortly. If the husband had not, at the time in question, had connection with his wife the wife must have had connection with somebody else, because the child was born, and she must have had sufficient connection with somebody else for a child to be begotten and conceived, and that is adultery.

Therefore I think there can be no question that the evidence given by the petitioner was relevant. Was it excluded by the rules of evidence or the principles of the English law existing at the time it was given? It is said that it was, because it has been laid down over and over again, it is said, that in the interests of decency, morality, and public policy a husband shall not be allowed after marriage to say that he had not had connection with his wife—it is put as broadly as that by Lord Mansfield—and in the same way a wife shall not be allowed to say the same thing with regard to her husband. If it has been so decided we must follow the authorities. I can myself see no principle upon which the evidence can be excluded. It is relevant to the issue, and any evidence relevant to the issue is, as a rule, admissible. I do not think that the numerous cases to which we have been referred establish the proposition contended for by the appellant. It is admitted that they are all decisions in which the legitimacy of a child was directly in issue, and was the question to be tried. I will take it, without deciding it at all, because it is not before me, that on the question of legitimacy that principle would still exist; but I wish to say nothing about it, because naturally it has not been argued here. It may have to be argued elsewhere on some future occasion, and I do not wish to prejudice the question if it ever arises for decision. There is no doubt that in the course of years this doctrine, which was established at a time when not only parties, but persons interested, could not give evidence, has been modified. For some reason (it is not for me to consider why) it seems to me that that doctrine has been confined to cases in which the legitimacy of the child is directly in issue. That is not so in this case. What the effect of this verdict, if it stands, will be upon the child's position and status I say nothing about, but it is quite clear that, whether it be indirectly affected or not, the question at issue was not the legitimacy of the child, but the adultery of the respondent. Therefore, there is in my opinion no authority that obliges me to say that evidence, which prima facie is certainly admissible, because it is not hearsay, or anything of that

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kind, but is the direct evidence of the person best qualified to know, and which is directed to and relevant to the issue, must be excluded. When one looks at the grounds on which it is said to be excluded I think it becomes clear at once that those grounds afford a criterion very difficult to apply in proceedings of adultery and divorce: they are called decency, morality, and policy. I am inclined to think they all come down really to decency, but it may be that there is something more in the question of policy, because counsel for the appellant pointed out, and he made a strong point of this, that, if such evidence be admitted, any man who wanted to get rid of his wife, as soon as she had a child, might say: "I did not have connection with her, therefore it is not my child, and therefore I must have a decree, I must get rid of her." No doubt that is quite possible. But I do not know that the possibility is of very great practical importance for two reasons: in the first place, although there may be men who would do that, I think they are rare; and, secondly, suppose a man did set up such a case, unless there was something which corroborated him very strongly no judge and no jury would ever attend to it; and one cannot shut out from consideration, when a danger like that is pointed out, that judges and juries have got some common sense and would ordinarily apply it. Of course in this case there was corroboration according to the learned judge's opinion, and I think he was right, in the statements and the conduct of the wife. But in the absence of something of that sort I do not suppose any judge or any jury would ever believe any man who set up such a case; therefore although it is a possible danger I cannot think it is a very serious one. But there is another side to the question. It is admitted that if the appellant's contention is right, then, in a case where the wife had written any number of letters, both to her husband and other people, saying that she had never had connection with her husband, and never would allow it from the time they were married, and they never had anything to do with one another, and the husband was prepared to say the same thing, neither the admission of the wife nor the evidence of

the husband could be put in, although it was an admitted fact—I do not mean admitted in Court, because the admission would be excluded—but an admitted fact to everybody who knew anything about the matter, that the wife had committed adultery, the man, by this so-called rule of law, must keep that adulteress as his wife so long as they both should live, or until she committed another act of adultery, simply because relevant evidence was not admissible. It seems to me that is just as contrary to public policy as the admission of the evidence. Public policy is no doubt a dangerous thing to invoke; it works both ways. Morality and decency in Lord Mansfield's judgment seem to me to come to the same thing. Now decency is very difficult to apply in the Divorce Court, and for this reason, that from the very nature of proceedings there evidence must constantly be given, perfectly admissible evidence, that is loathsome to the mind of any ordinary man or woman. There is no doubt about it; it arises from the nature of the proceedings. Take, for instance (I do not say the analogy is complete, it is not), what happens in nullity proceedings. Probably no more disgusting details are ever given than in some nullity cases. There is no doubt of their admissibility in evidence. As I say, the analogy is not complete, because in that case if the petition succeeds the marriage is not dissolved, but is declared never to have been a valid marriage at all; but that does not seem to me a complete answer, because the marriage, although declared null on the ground of impotency, is not a void marriage, it is voidable until the decree has been made; and therefore at the time that the evidence is given those people are legally man and wife, and as a matter of fact, of course, we know that all petitions for nullity do not succeed, and if the petition for nullity be dismissed they remain husband and wife, and yet that evidence has been given, and if there is any argument upon decency one would have thought that that evidence should have been rejected in that case, although the marriage after the decree has been decided not to be null. If there be any question about it, the argument of decency applies just as much to that as to any case

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of divorce on the ground of adultery. There are many other cases, one was mentioned in argument, of evidence that is given without any doubt as to its admissibility, where the wife complains of cruelty by having been infected with a venereal disease. Evidence most loathsome to the ordinary mind is given in those cases, and yet if the evidence in this case is to be excluded on the ground of decency I cannot see why the evidence in those cases should not be excluded also. When it is said: "But it cannot be given because of the sanctity of the marriage tie," it must not be forgotten that the proceedings in nullity cases are for the very purpose of destroying the marriage tie and putting an end to it. As I say, I can see no principle on which this evidence is not admissible. I do not think that the cases establish its inadmissibility in a case of proceedings instituted in consequence of adultery. If they establish it in the case of questions of legitimacy, well, that is an exception which, to my mind, ought not to be extended so as to override the principle that evidence relevant to the issue, which is admissible evidence, because it is given by the person who knows, who has seen, and who has acted, should be admitted, and for these reasons I think that the evidence in question is admissible.

I am not going to trouble about the practice, which we have been told has been in existence, of admitting evidence of this kind. I think there are cases which have been cited before the late Lord St. Heliers, before the late Lord Hannen, and before other judges of the Divorce Court, which all go to show that in their opinion, according to the practice of the Divorce Court, such evidence could be given, whether upon questions of adultery or sometimes on the question of the custody of children, where the question of paternity comes in issue. It may be that practice has been wrong, at any rate it is a practice that does not bind us. In my opinion it was not wrong. I think it proceeded upon the proper ground: the evidence was admissible and relevant, and the exception which did not allow it in legitimacy cases does not extend to cases in the Divorce Court, cases

instituted in consequence of adultery. For these reasons I think that the appeal fails, and should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. This is the appeal of the wife from a decree of dissolution founded on the verdict of the jury that she had committed adultery with a man unknown. Substantially the evidence of adultery consisted in the birth of a child of which it was alleged the petitioner was not the father. The issue before the Court was simply: had the wife committed adultery or not? It is true that the decision of that issue turns largely, and perhaps one may say wholly, on the question whether the petitioner was, or was not, the father of the child. The petitioner was called as a witness. It appeared that on the nights of December 18 and 19, 1920 (the child being born early in October, 1921), the husband and wife had occupied the same bed, but he denied that marital intercourse had then, or at any time at which in the course of nature the child could have been conceived, taken place. It was this evidence which, after objection, was admitted by the judge, to the admissibility of which objection is now taken. The main question on the appeal is whether that evidence was rightly admitted. It is, of course, clear that if it was not rightly admitted then the verdict cannot stand, because, under the circumstances, the mere birth of the child would be no evidence of adultery. Those being the main circumstances of the case, and the question being that which I have stated, we have to determine whether there is any rule of law which prevents the husband from giving that evidence which he gave with reference to the two nights of December 18 and 19, and, less important, with reference to the succeeding month of January; the crucial question is as to the two nights, December 18 and 19.

Before the Evidence Further Amendment Act, 1869, the husband would not, in this case, have been a competent witness; but it was thereby provided that the parties to any proceeding instituted in consequence of adultery, and

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the husbands and wives of such parties, shall be competent to give evidence in such proceedings. The effect of that seems to me to be simply that, after that statute, the husband was a competent witness, but, of course, was subject to the ordinary rules of evidence, and was under all the restrictions which those rules impose upon every witness who is called to give testimony. Is there any rule of law which, in proceedings where the issue is adultery, precludes the husband or the wife from stating that, on a relevant and material occasion, marital intercourse did not take place between them? What is said is this: There is an old rule of law (and I may take a statement of it from Lord Mansfield's judgment in *Goodright* v. *Moss* (1), which, by the way, is a dictum, but it is really none the less forceful for that, but if the facts of the case are looked at it is not a decision upon any point to which they gave rise). "It is a rule founded in decency, morality, and policy, that they"—that is the father and mother of a child—"shall not be permitted to say after marriage, that they have had no connection and therefore that the offspring is spurious." The rule is thus stated by Lord Mansfield, and it has in several cases been applied where the legitimacy of a person born in wedlock was directly in issue. It has not, so far as the industry of counsel has been able to investigate the question, ever been decided that that rule applies except in such cases. In the present case the issue is: Has the wife been guilty of adultery? The legitimacy of the child is not in issue. It is true that whether or not the husband is the father of the child is a fact material to the decision of the issue, but it is not the issue itself; and, without expressing any final opinion upon such a subject, I may go as far as to say that without having heard what is to be said to the contrary, I should apprehend the verdict of the jury would not be evidence against the child in proceedings taken for the purpose of establishing his legitimacy or the reverse. But however that may be the legitimacy is not the issue which the jury had to determine. As a general rule evidence is

(1) 2 Cowp. 591.

admissible which is relevant to the issue. That this evidence which is now objected to was relevant to the issue cannot, of course, for a moment be disputed.

If any fact relevant to the issue has to be proved or disproved, usually the best evidence ought to be given on that fact; the fact to be proved or disproved being the fact of marital intercourse, what better evidence could be given than that of one of the parties? It seems to me, therefore, that, on the general principles applicable to the admissibility of evidence, this evidence clearly ought to be admissible. But one cannot leave the matter there, because it has been suggested that the rule to which I have referred, which has been resorted to in cases where legitimacy is in issue, is one of more general application, and one which prevents altogether, whatever may be the issue, inquiry into the relations in this matter of the husband and the wife. There is no authority of any decided case for that proposition. The only statement which approaches it is what was said by Lord Halsbury in the *Poulett Peerage Case*. (1) He there speaks of a rule (I am using his words) "which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be enquired into in any Court of Law." Now what he there said was not necessary to the decision of the case before him. What he had to consider was whether a statement by a man that he had not had intercourse before marriage with a woman, who afterwards became his wife, was admissible. That was the question which he had to consider, and he was stating what he there referred to as the rule in contrast with that which he was asked to decide—namely, that any statement referring to the time before marriage was inadmissible. In deciding that that was admissible he contrasted the two positions and referred in that way to that rule. With all respect to Lord Halsbury I think the statement he thus made was too wide. It was certainly not justified by any of the long string of authorities which have been referred to. Now putting that aside, is there any principle in accordance with which we ought to

(1) [1903] A. C. 395, 399.

C. A. 1923

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Warrington L.J.

say that the evidence in question should be rejected? It is said that it ought to be rejected because to admit it is contrary to decency, morality, and public policy. With regard to morality and public policy, with all respect to those who have used those expressions, I cannot see that the interests of morality and public policy are promoted by a refusal to accept that which may tend to elicit the actual truth of that which has to be decided. With regard to decency, when we have to consider the proceedings in the Divorce Court it is strange that we should be asked to exclude some particular item of evidence on the ground that to admit it would be contrary to the principles of decency. It seems to me therefore that it is impossible to justify the rejection of the evidence in question, either on authority or on principle; and in my opinion the evidence was rightly admitted.

With regard to the rest of the case I have nothing to add to what has been said by the Master of the Rolls. It seems to me that the summing up of the learned judge was exceedingly careful, that he gave to the jury all the warnings that it was necessary to give; that there being no objection to the summing up it is hardly disputed that there was evidence on which the jury might come to the conclusion at which they arrived, and I think on the whole, therefore, that the appeal fails and must be dismissed.

SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Withers, Bensons, Currie, Williams & Co.*

Solicitors for respondent: *Taylor & Humbert.*

G. A. S.

DIVORCE.

1923
Oct. 15, 16.

JACKSON *v.* JACKSON.

Husband and Wife—Desertion—Refusal of Sexual Intercourse—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

Desertion in matrimonial law must include the abandonment by one spouse of the other, or causing her or him to live apart. The mere refusal or abandonment of sexual intercourse while the parties continue to abide under the same roof is not desertion.

Orme v. *Orme* (1824) 2 Add. Eccl. 382 followed.

Powell v. *Powell* [1922] P. 278 and *Pulford* v. *Pulford* [1923] P. 18 considered and explained.

Appeal from the magistrates of Burnley, who had made an order under the Summary Jurisdiction (Married Women) Act, 1895, finding a husband guilty of desertion, ordering him to pay his wife 1*l.* a week maintenance, and giving her the custody of an infant child.

The parties were married in 1903 and lived together, not very happily but without open breach, for fifteen years. There were three children of the marriage, two boys born in 1903 and 1904, and a girl, born in 1917. The husband was foreman in a weaving mill at Burnley; his wife worked under him as a weaver, and the sons also worked in the same mill. Out of their joint earnings they had bought and furnished the house in which they lived. In November, 1918, the wife went to work in Huddersfield for the Government; there was no evidence whether she went with her husband's consent or not. In March, 1919, hearing that her baby daughter, whom she had left with her sister, was ill, she came back and took the child to Blackpool, where she worked till Christmas of that year. She then returned to Burnley, but did not go to her husband until February, 1920, when she went to his house and claimed to live there, saying she had as much right to the house as he had. He said he had done without her for so long, that he could do so for ever; but did not oppose her going to her old room; and after about ten days marital relations were resumed. About March, 1922, the husband refused to sleep with his wife because she insisted on having the little girl, who had

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whooping cough, in bed with her. From that time the husband and wife slept apart, and neither approached the other with a view to sexual intercourse. On August 1, 1923, the wife took out a summons before the magistrates asking for an order for maintenance and the custody of the daughter on the ground that her husband had deserted her. The magistrates adjourned the summons for three weeks in order that the parties might come to an agreement. Neither party appeared to have made any effort towards an agreement. On August 20 the wife left her husband, taking with her part of the furniture. On August 23 the summons came on again for hearing; the wife gave some further evidence of acts of hostility on the husband's part, but both at the first hearing and on the adjournment the principal matter relied on was the husband's refusal of sexual intercourse. The magistrates found the husband guilty of desertion, ordered him to pay his wife 1*l.* a week maintenance and gave her custody of the daughter.

The husband appealed.

Eastham K.C. and *Cotes-Preedy* for the appellant. The decision of the magistrates could be supported only on the ground that a refusal of sexual intercourse amounts to desertion even when the parties continue to reside in the same house. There is no authority for any such proposition. In *Wily* v. *Wily* (1) it was held that the husband's offer to receive his wife into his house without cohabitation was no answer to a wife's petition for restitution of conjugal rights; but it was admitted that the Court could not enforce matrimonial intercourse. The case turned on the fact that the husband only offered residence in the same house without affection. In *Powell* v. *Powell* (2) the husband had divided his house into two separate dwellings and lived wholly apart from his wife in one of them, and had, after the period of two years had expired, brought another woman to live with him. In *Pulford* v. *Pulford* (3) it was only decided that there might be desertion though the matrimonial home was broken up by circumstances beyond the control of the parties. In

(1) [1918] P. 1. (2) [1922] P. 278. (3) [1923] P. 18.

that case the husband was living in adultery with another woman.

T. Bucknill for the respondent. In *Synge* v. *Synge* (1), where the wife sued the husband for desertion, it was proved that the parties had been living apart by mutual consent, and when the husband asked his wife to return she had refused to live with him except upon the terms of no intercourse; and Sir Francis Jeune said that the husband had not deserted his wife, she had deserted him. Refusal of sexual intercourse may not be a desertion per se, but it is an important fact to be taken into consideration. The magistrates having the cases of *Synge* v. *Synge* (2) and *Pulford* v. *Pulford* (3) before them, and having heard the evidence and seen the parties, were justified in finding that the husband's conduct amounted to desertion.

THE PRESIDENT (SIR HENRY DUKE). This is a case of the first impression so far as recent exercise of jurisdiction in this Court is concerned. The facts are very remarkable, and they exhibit the tendency there is under the stress of these times on the part of spouses of both sexes to try to find pretexts which shall be sufficient in law to relieve them from their marital obligations. [His Lordship stated the facts as above and continued:] On those facts the wife issued a summons alleging that the husband had deserted her, and upon that summons, after an interval of about three weeks, the magistrates pronounced judgment. They gave judgment to the effect that the husband, who for years had been living, on the terms which I have stated, in the same matrimonial home with his wife, had at that time deserted her; and that is the judgment which is appealed from in this case.

The grounds upon which the decision was sustained are two. One of them is a ground of fact. It is said that he had deserted her in that he had refused sexual intercourse to her deliberately and for a long time with the intent to withdraw himself from his marital duties. That is the ground upon which the wife's evidence at the first hearing proceeded. It is the substantial ground, because the wife stated candidly the position in which the parties had been living; what had

(1) [1900] P. 180, 196. (2) [1900] P. 180. (3) [1923] P. 18.

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happened between them ; why the husband had not continued to sleep in the same bed with her ; and that she had never asked him to come back to her bedroom, but that his place was to come back if he wanted to. Yet it was apparently submitted to the magistrates that the alleged refusal of sexual intercourse was proof of desertion. Really it is a pitiful case ; two people in middle life who have had each other's society during the best of their days and have prospered in it and have not enough decency and common sense to live together as they ought to, but must squander their substance in futile and mischievous litigation.

Then it was said that there was desertion upon a ground founded on the terms of a judgment which I delivered in *Pulford* v. *Pulford* (1), that if the action, or the abstinence, of the husband had not previously amounted to desertion, since that decision it did so. And it was said that Lord Buckmaster's judgment in *Powell* v. *Powell* (2) had somewhat of the same effect, and other judgments were referred to. There was the substance of the matter, and it was argued that the magistrates were entitled to come to the judgment at which they arrived. On August 1 they shrank from it; but on August 23 the case came on again. The wife then gave further evidence. [His Lordship reviewed the further evidence set out above and continued :] The underlying material fact with regard to it is that during the whole period these parties were living together, though with differences between them, and perhaps breaches of duty on one side or the other. It seems to me that it would be a false pretence to make a judicial finding that one of these parties had in point of fact deserted the other at any time which is in question in this case.

Now I come back to the question of law.

The proposition is that refusal of, or purposeful abstinence from, sexual intercourse on the part of one of the spouses towards the other is matter upon which desertion may be found, that it may be found either upon that fact in conjunction with other facts which do not establish desertion, or by the force of that very fact.

(1) [1923] P. 18. (2) [1922] P. 278.

There is an old saying that forty black rabbits do not make one black ram, and it may be applied to the proposition that you may add together facts none of which establish desertion and as to all of which desertion is negatived by some other paramount fact and find, in spite of the paramount fact, that the subordinate collateral facts establish desertion. They do not.

If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate and apart, that is desertion. I am not going to attempt an exhaustive definition of desertion. No judge, so far as I am aware, has sought to do so, and certainly there is no prospect of its being successfully done.

There is a constant change in the modes in which people refuse to perform their elementary duties, and it might be helped by some mechanical statement of what does amount to desertion, but I am not aware of any case in which it has ever been said that desertion could be found upon notional grounds while the parties were living together. When one of the parties has deserted the other they are living separate and apart. There is a passage in a judgment of the full Court of Appeal in the case of *Reg.* v. *Leresche* (1), pronounced by a very learned and, if I may respectfully say so, wise judge, Lopes L.J. With the assent of his brethren, he said this: "A husband deserts his wife if he wilfully absents himself from the society of his wife in spite of her wish." In other words there must be living apart, and there must be abandonment where there is desertion in the normal sense. Now we have to see whether that refusal of, or abstinence from, sexual intercourse is in point of law such a living apart when parties are in the same house together.

I said to Mr. Bucknill that I believed that this case was in substance covered by authority. I will refer in a moment to the authority. I am better content to deal with the subject first upon grounds of principle. How does it stand in point of principle? Wanton refusal of one or other of the parties to a marriage to have sexual intercourse is no doubt a wrong thing. It is the intentional breach of one of the ties of marriage, but it does not produce either separation

(1) [1891] 2 Q. B. 418, 420.

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or living apart. It may be a ground upon which the party against whom the refusal is made may decide to go away; and in the case of *Synge* v. *Synge* (1), in the Court of Appeal, which has been so much pressed upon us, Collins L.J. said that where, upon a refusal of sexual intercourse by one of the spouses, the other had decided to go away, they were living apart by mutual consent. But reflection upon the manifold duties of the married state must, I think, convince any reasonable mind that this refusal of itself by one of the parties, while the parties remain living together and discharging the other duties of the married state, cannot be said to amount to desertion. It is not abandonment; it is not living apart. If it is a refusal of a duty it does not purport to conclude the matrimonial relationship.

The authority I referred to is *Orme* v. *Orme* (2), to which I called Mr. Bucknill's attention in the course of the argument. It is a case very much like the present, where the wife complained of that which was in substance the complaint here and sought on that ground a decree of restitution of conjugal rights. A decree of restitution was the remedy of the Ecclesiastical Courts in respect of desertion. Desertion did not at that time give the rights which, under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and the subsequent Acts, it now gives. So the case is in point here, and there being the claim for a decree of restitution on the ground to which I have referred, Sir Christopher Robinson, who had expressed some surprise at the nature of the claim, said: "I think the objection taken to this libel is well founded. It sets up a case either altogether without the jurisdiction of the Court, or one, at least, very far transgressing those bounds of interference, to which it has restricted itself in modern practice." The explanation of that is supplied by a passage in the judgment of Lord Stowell in *Forster* v. *Forster* (3) which is cited in the judgment of Sir Francis Jeune in *Synge* v. *Synge*. (4) Lord Stowell said that "the Court can decree cohabitation; it cannot decree sexual intercourse." Sir Christopher Robinson went on to say:

(1) [1900] P. 180; [1901] P. 317.
(2) 2 Add. Eccl. 382.
(3) (1790) 1 Hagg. Cons. 145.
(4) [1900] P. 180, 192.

"The parties are admitted to be actually cohabiting"—that is living together—"and being so, it is, in my judgment, quite incompetent to the Court to interpose between them, in the manner, and upon the grounds, now prayed. No instance of a libel, so framed as the present, in a cause of restitution of conjugal rights, is even pretended, on the part of the wife." So that this ground for a finding of desertion against one of the spouses was stated just upon one hundred years ago to have been unprecedented, and there is no precedent for it now unless it is found in the cases to which I have referred.

It is necessary to say a word about those cases. A passage was read from the judgment which I gave in the case of *Pulford* v. *Pulford* (1), containing statements to this effect: "The law does not deal with the mere matter of place. What it seeks to enforce is the recognition and discharge of the common obligations of the married state. If one party does not acknowledge them, the party who has so offended cannot be heard to say that he or she is not guilty of desertion on the ground that there has been no desertion by departure from a place." I dare say if that were read to a layman without any statement of the principles to be applied to it, or the subject to which it referred, he might be led to suppose that there was desertion in this case. The facts in *Pulford* v. *Pulford* (1) were that the parties had lived together for years, but were at last living separate and apart, and the question was, had one of them deserted the other at a particular point of time? Those observations are addressed to that question. If they were addressed to the present question, they would be couched in totally different terms and would be limited to the question. They may be too wide, but that is immaterial in this case. They do not found, and were certainly not intended to found, any such ground of claim in the case of desertion as was alleged in this case.

Sundry other judgments are referred to. One of them is a judgment of my learned brother, and another is a judgment of Lord Buckmaster in *Powell* v. *Powell* (2); that was in a case where a man severed his dwelling house and

(1) [1923] P. 18, 21. (2) [1922] P. 278.

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lived practically, although not geographically, apart from his wife. He devoted to himself one part of his dwelling house and to his wife another part. It could be said that he was living apart from her, and the learned judge said in the circumstances of that case he took that view, and anybody who reads the case will see why that conclusion could be arrived at. That case throws no light at all on this case where the parties at all material times were living together, and where the wife went in the first instance from the joint matrimonial home to try to maintain before the magistrates that her husband had deserted and was living separate and apart from her.

So, this contention advanced for the respondent is bare of authority, and the decision of the magistrates cannot be supported in my view upon any ground of principle, and is inconsistent with the elementary grounds upon which the question of desertion must be decided.

There is only one other observation I want to make and it is this. It has been assumed all through this case that the husband has refused sexual intercourse with the wife. Over and over again it appears that he has never been invited during the period in question to any act of sexual intercourse, or to any intimate form of cohabitation with his wife, but that they have been living in a state of mutual hostility. I do not dwell upon that part of the case, because I am content to deal with the appeal upon principle as though there was a refusal of cohabitation.

On the grounds which I have stated at some length it seems to me that this appeal succeeds, and the order of the magistrates should be set aside.

HILL J. I entirely concur in what the President has said, and only want to add a word or two, because one or two of my own decisions have been cited by Mr. Bucknill as if they were in support of the propositions which he makes. In my view, they are no support at all. There may be desertion though the husband continues to live under the same roof with the wife, but in such case the facts must be very strong. They must show that the husband really causes

the wife to live apart against her will—not only sleep apart, but to live apart. Refusal to occupy the same bed and refusal to have sexual intercourse may be a fact which, taken with other facts, has weight in considering whether the husband has really caused the wife to live apart. I say may be, because even so, in my view, the refusal of sexual intercourse would have to be considered in connection with the age of the parties, the state of their health, the number of children they already had, and a number of other circumstances. It may be a circumstance which ought to be taken into account, but at the best it is only a circumstance which may be taken into account along with others, and in my view it would be entirely wrong to suppose that, taken by itself and independent of anything else, it would ever be possible to base upon it a finding of desertion. No case has ever said anything of the sort. None of the cases relied upon says anything of the sort. As to the case of *Pulford* v. *Pulford* (1), to which I was a party, I adopt with the greatest respect now, as I did then, everything that the President said, but it seems to have nothing whatever to do with the questions which arise in this case. In *Powell* v. *Powell* (2) the facts went a long way beyond the mere fact of refusal of sexual intercourse. The husband forsook his wife's bed and society, shut himself up in a separate part of the house, refused her access to him, told her that he was introducing another woman, and then finally left the house. In *Synge* v. *Synge* (3) the decision does not help Mr. Bucknill. He relies upon what is, after all, an obiter dictum of Sir Francis Jeune when he said: "Rather the wife deserted the husband." At that time the parties were in fact not living under the same roof, and the wife was refusing to come under the same roof and set up house with her husband except upon a condition which she had no right to impose. *Wily* v. *Wily* (4), whether it is rightly or wrongly decided upon its particular facts, is clearly no support of Mr. Bucknill's contention, because I was very careful to point out that I was granting a decree of restitution because the husband's refusal went far beyond the refusal of sexual

(1) [1923] P. 18.
(2) [1922] P. 278.
(3) [1900] P. 180, 196.
(4) [1918] P. 1.

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intercourse. I have looked up my note in *Diver* v. *Diver* (1), to which Mr. Bucknill referred. The husband had actually and physically departed from where the wife lived for one year and ten months before the separation. The only question was whether the separation had begun a few months sooner than the date when he actually left the house. It appeared that not only was he insisting upon sleeping in a separate room, but that he never spoke to the wife, that when the wife spoke to him he never answered her, and when she asked him why he so treated her, he knocked her down. It does not seem to me that in that case it was a very strong inference to draw that he had already begun his desertion two months before he left the house. The decree nisi which was granted in that case may also be supported by the fact that I may have found—I have no recollection whether I did, one way or the other—cruelty upon the assault. That again is no support for Mr. Bucknill's contention.

In the present case it seems to me that, apart from the refusal of intercourse by the husband, if it be a refusal, there were no facts upon which the magistrates could find that the husband was causing the wife to live, or had caused the wife to live, apart from him, and it would therefore, to my mind, be quite wrong to send the case back to the magistrates, as Mr. Bucknill invites us to do. The facts are all there, and upon those facts there was, in my judgment, no evidence upon which the magistrates could find that the husband deserted his wife, and I therefore agree that the order must be set aside.

Appeal allowed: the wife to have her costs up to 20l., which the parties had agreed should be treated as if the wife had applied for security for costs and that sum had been ordered to be paid into Court.

Solicitors for appellant: *Stow, Preston & Lyttelton, for J. C. Waddington, Burnley.*

Solicitors for respondent: *W. J. & E. H. Tremellen, for Mossop & Bowling, Burnley.*

(1) Not reported.

J. R. B.

ADMIRALTY.

1923
July 24, 27;
Oct. 19.

(In Prize.)

In the Matter of THE DESTRUCTION OF CERTAIN ARMED TURKISH VESSELS (H.M. Submarine *E*.12).

Prize Court—Prize Bounty—Armed Vessels carrying Munitions of War—Destruction of small Turkish Sailing Vessels—Armed Ships of the Enemy—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 42.

Acting on the instructions of the Naval Commander-in-Chief, the claimants, the officers and crew of a British submarine, sank by gunfire a number of small Turkish sailing vessels engaged in carrying munitions of war to the Turkish military bases and arsenals in the Sea of Marmora.

The vessels did not carry any armament structurally attached to them, but their crews were armed with rifles and, on each occasion when attacked, the crews took to their boats, got ashore, and opened fire on the submarine with their rifles.

By an Order in Council of March 2, 1915, which put into operation s. 42 of the Naval Prize Act, 1864, prize bounty at the rate of 5*l.* for each person on board the enemy's ship is payable to such of the officers and crew of any of His Majesty's ships of war as are present at the taking or destroying of any armed ship of the enemy:—

Held, that the inference to be drawn from the facts that the commander of the submarine had instructions to sink sailing craft of the sort in question and that in each case the crews, instead of scattering and making their escape, opened fire on the submarine, was that these sailing vessels had been taken under the control of the Turkish Administration, and were not to be regarded merely as merchant vessels in private ownership engaged in the carriage of contraband. They were therefore ships of the enemy within the meaning of s. 42:—

Held, further, that the vessels were armed ships when they were attacked, and that it would give too restricted an operation to the rights provided by the statute to hold that they had ceased to be armed ships because their crews with their rifles had left before the vessels were actually destroyed. The claimants, therefore, were entitled to an award of prize bounty.

Motion for an award of prize bounty in accordance with the provisions of s. 42 of the Naval Prize Act, 1864.

The claimants, Commander Bruce, D.S.O., R.N., and the officers and crew of H.M. Submarine *E*.12, claimed declarations that they were entitled to awards of prize bounty in respect of the destruction in the Sea of Marmora, on September 21, 1915, of six Turkish sailing vessels with a complement of

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thirty men; and on October 5, 1915, of a steamship and fifteen sailing vessels with a total complement of seventy men.

The question at issue was whether the sailing vessels were to be regarded as ordinary merchant vessels engaged in running contraband cargoes, or as armed ships of the enemy within the meaning of s. 42 of the Naval Prize Act, 1864.

The facts are summarized in the headnote and are fully set out in the judgment.

Wilfrid Lewis for the claimants. The evidence in the possession of the Commander-in-Chief showed that vessels of this type were being employed by the Turkish naval authorities for the carriage of munitions of war; and it is immaterial whether they were State-owned or merely chartered by the State. Their crews carried rifles, and the vessels therefore were armed ships within the meaning of s. 42 of the Naval Prize Act: *In the Matter of The Naval Operations in Mesopotamia*, 1914–15. (1) If they were armed ships, however, it is submitted that they would come within the section even if they were owned by subjects of the enemy State. This question was left open by Lord Sumner in *H.M. Submarine E.*14. (2) Although fire was opened from the shore, at the beginning of the engagement the vessels were armed, notwithstanding that the rifles then on board were not fired till a later stage.

Hilbery for the Procurator-General. These vessels were merely suspected of carrying munitions of war for the Turkish forces. There is no evidence that these small sailing craft were in the regular service of the enemy State or even that they had been pressed into that service. They would appear to have been ordinary merchant craft running contraband cargoes. Further, they were not armed ships when sunk or destroyed, and on that ground the case is distinguishable from *In The Matter of the Naval Operations in Mesopotamia*, 1914–15. (1)

Cur. adv. vult.

(1) [1923] P. 149. (2) [1920] A. C. 403.

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Oct. 19. The President (Sir Henry Duke). These claims arise out of the action of H.M. Submarine *E*.12, which was detailed to enter the Sea of Marmora on various occasions when the approach was closed by naval defences of the kind which during the war became familiar. The mere achievement of the passage into the Sea of Marmora conferred much distinction on the officers and men concerned, who had made a series of incursions before the raids now under consideration.

By September, 1915, acting on the information in his possession, Admiral de Robeck, who was in command, gave personal instructions to Commander Bruce that there were certain classes of vessels with which he was to deal. I am satisfied that the commander acted on those instructions, and that so acting he destroyed and sank the vessels in respect of which the present claim is made. There is a claim in respect of the destruction on September 21 of what are described as six armed Turkish sailing vessels, and a claim in respect of an operation on October 5, where the service alleged to have been rendered is the destruction or sinking of an armed Turkish steamer and fifteen armed Turkish sailing vessels. The sailing vessels, as far as the information before me goes, were vessels customarily engaged in time of peace in commercial business in the Sea of Marmora; normally they were commercial sailing craft, and were said to be at the time in question engaged in carrying various munitions of war. I have no doubt that they were so engaged. The positions in which they were found—in one case returning apparently from a trip to Panderma, where there were munition factories and arsenals, and on the other occasion going to or from Rodosto, where there were works used for military purposes by the Turkish authorities—make the character of their enterprise fairly clear, and they might have been captured as being vessels engaged in carrying contraband of war.

But that does not dispose of this question. In some of the evidence there was a disposition to lay much stress on the fact that these vessels were engaged in carrying munitions of war; but that fact does not by any means constitute them armed vessels of the enemy. Even if these were vessels

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carrying munitions of war, and having arms on board and using them, the strong impression on my mind is that those facts would not be sufficient to constitute them armed vessels of the enemy.

Commander Bruce and his brother officer, Lieutenant-Commander Fox, gave evidence, and Commander Bruce told me the instructions which he received. Before he got these orders there was reason to suppose that a submarine venturing near certain classes of craft in the Sea of Marmora, and neighbouring waters, would be exceedingly likely to find herself sunk by gunfire, or a bomb, or by other fire if she were in a position in which gunfire was not practicable. The vessels in question might well have engaged submarine *E.*12 with success.

On September 21, 1915, Commander Bruce says he sighted six sailing vessels, and chased them into a small bay near Panderma. The crews, numbering four or five in each vessel, abandoned their ships and fled to the shore, and immediately opened fire upon *E.*12 with rifles at a range of about 1000 yards, and he says he sank the six.

On October 5 the *E.*12 sighted a small enemy steamer and seventeen enemy sailing vessels in Rodosto Bay. The steamer was armed, and she was fired upon, and the only question with regard to her is whether she was destroyed. I will deal with that as a question of fact. It does not raise any matter of principle; she was undoubtedly an armed vessel of the enemy. [His Lordship held on the evidence that the steamer was destroyed.]

The suggestion against the claim in respect of the sailing craft is that they were being convoyed in the manner in which vessels are convoyed in time of war. The commander says in his affidavit that the crews of the steamer and the sailing ships abandoned their ships, and that "immediately the crews of the sailing vessels reached the shore they opened fire upon me with rifles, which said rifles I verily believe had been taken by the said crew from on board the said steamer and the said sailing vessels. Owing to the said rifle fire I was forced to keep 2000 yards from the said steamer

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and sailing vessels when engaged in destroying them. The crews of the said steamer and the said sailing vessels kept up a heavy fire upon me for about thirty minutes, when the battery at Erekli Point, about 5000 yards distant, opened fire upon me; an enemy destroyer then appearing forced me to dive and to abandon the task of destroying the remaining two sailing vessels." Commander Fox, in respect of the proceedings on October 5, says: "The crews of the said steamer and the said sailing vessels landed at widely divergent points, and from each of the said points at which the crews of the various vessels landed, and from nowhere else, there immediately came an intense rifle fire, causing the *E.*12 to stand off to a distance of 2000 yards whilst the work of destruction of the said steamer and the said sailing vessels was completed. From the intensity of the fire opened upon *E.*12 I verily believe that there were at least fifty persons firing upon us." He corroborates Commander Bruce as to the other incidents.

The facts I have stated are the materials on which I have to come to a conclusion whether these sailing vessels were armed vessels of the enemy. At the hearing I found it a perplexing task. There was a simple set of facts with very rudimentary information, and the inquiry is a serious one in point of principle. The amount of money involved here is not serious, but it is a serious thing to come to the conclusion, with regard to merchant vessels carrying men on board with arms, that they are to be taken by reason of that fact to be armed vessels of the enemy. It involves considerations quite outside those relative to the subject of Naval Prize Bounty; it affects the whole status of persons engaged in commerce in time of war.

It was argued with regard to the sailing vessels that they were not shown to be armed vessels of the enemy, and at any rate, as it stood on the evidence, that they were not armed vessels when they were sunk. If, however, they were armed vessels when they were engaged it would take a great deal of argument to persuade me that I ought to assume that they had ceased to be armed vessels because certain men

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had left them with their boats and taken certain weapons. I should not decide the case upon any such ground as that; I think it would give too restricted an operation to rights intended to be created by the Naval Prize Act, and would introduce a fine point of law into what is really a broad question of fact. If the vessels were armed vessels at all I should be ready to find that they were armed vessels at the time that they were sunk. Were they armed vessels? There is no evidence that they had any mounted arms or that they had been fitted for naval warfare, but the authorities have acquiesced for some time in the view that that is not conclusive. Manned by men instructed in the use of and armed with rifles, they were vessels sufficiently armed to have sunk submarines. Submarines had to keep 2000 yards away from the shore because of the risk of being sunk, and I come to the conclusion that these were at all material times armed vessels.

The next question is whether they were armed vessels of the enemy. I have said enough on the question of their being found with munitions, or material for the manufacture of munitions on board, as to whether that would be sufficient to make them armed vessels of the enemy. I do not find that it would. But I must look further than that. I must try to see whether these vessels had been taken up by the Turkish authorities and taken under their control, and put in a position for offensive or defensive operations as part of the service of the forces afloat engaged in the military service of the Ottoman Government. It is true that I have not much information, but I am struck, and the more I have reflected on it I have been the more struck, with the action of the crews of the several vessels on the several occasions as to which I have had evidence. On each occasion these men, who, on the hypothesis presented against the claim, are only seamen whose chief concern is to make their trip and to make it in safety, do not scatter and get out of the way, do not get into their boats and put up a flag or signal of some kind, but each vessel sends out an armed crew, positions are taken up along the shore, and rifle fire is opened upon the

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submarine and maintained, in the first instance until the operation of sinking these vessels is complete, and in the second instance until a fort at a distance of two-and-a-half naval miles opens fire upon the submarine, and a Turkish destroyer approaches with the probability of sinking the submarine. Is that like the conduct of merchant seamen engaged in commercial traffic ? I cannot conceive that it is. I have the strongest possible suspicion, amounting in fact to conviction, that these men did what they were there to do. I do not regard the naval arrangements of the Turkish Administration as I would regard the naval arrangements of an Administration with a highly organized naval service, like those of the great European Powers ; it is not the same thing at all. On the hypothesis, a party of merchantmen are earning their daily bread on the sea, and yet they behave on successive occasions in the manner I have indicated, showing that they were an effective belligerent force. They engaged this submarine and might very well have sunk it. What does that mean ? I should have had a very definite suspicion as to what it meant without the affidavit of Sir Oswyn Murray, who spoke of this transaction as an " engagement," although the term is not used in any technical sense, but merely by way of description. I think he was perfectly accurate, and that there was an engagement, fought by armed ships which had been taken under the control of the Turkish Administration by some means best known to themselves, and that these had become armed vessels of the Turkish Administration. But there is something more. Admiral de Robeck, before Commander Bruce and his comrades set out on this expedition, told them that certain craft were to be sunk. Nobody can suppose for a moment that an officer in His Majesty's service would be told to sink mere merchant ships, even though they were carrying contraband. What does it mean ? I have nothing beyond the plain evidence of the officers, and it seems to me that I must take it that these vessels, which were replenishing the stores of the arsenals and munition factories on the Sea of Marmora, were provided for in the way of defence by the Government which was using them, and that the practically

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certain consequence of the approach of a submarine was that they would endeavour to sink her by the various means with which they were supplied. That seems to me to be a strong circumstance in this case. There is much which is left to conjecture and presumption, but on the best consideration I can give to the case, and with no disposition to enlarge the provisions of the Naval Prize Act by any careless consideration as to what are the circumstances under which prize bounty arises, I find that these sailing vessels were armed vessels of the enemy.

There will be an award of prize bounty in the sum claimed, 500*l.*

Solicitors for the claimants: *Woolley, Tyler & Bury.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

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Oct. 17, 18, 31.

ADMIRALTY.

THE AUSTRALMEAD.

Shipping—Collision—Turning Signal—Duty of Vessel turning round in the River—Humber Rules, 1910, *r.* 14.

A steam vessel which has given the appropriate whistle signal under the Humber Rules to indicate that she is about to turn round in the river, thereby imposing the duty on other vessels of keeping out of her way, is not entitled to put herself athwart the channel and continue to come athwart, but must complete her turn, using no more of the waterway than is reasonably necessary for the purpose.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the keel *Pioneer*, the owners of her cargo, and the master and mate proceeding for the loss of their effects. The defendants were the owners of the steamship *Australmead.*

The collision took place on the morning of January 25, 1923, in the River Humber, off the knuckle of the Bell Mouth of the Alexandra Dock, Hull. The *Pioneer,* a wooden keel

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of 160 tons capacity laden with a cargo of wheat and maize, was one of eight keels in tow of the tug *Salvage*. The keels were in four ranks, the *Pioneer* being the first keel on the port string, the whole flotilla being about 470 feet in length. The tug with her tows had left the Alexandra Dock bound up river for Goole. The *Australmead*, a steamship of 4151 tons gross, 370 feet long, and part laden, was bound for the Alexandra Dock, but had some time to wait before she could enter. She had a head tug and was in charge of a pilot. She had come up the river, and when abreast of No. 12 buoy and to the south of mid-channel gave the appropriate signal under the Humber Rules of one short blast followed by four short blasts to indicate that she was going to turn round under port helm ; and she began to turn, intending to get head to tide and wait. The tide was flood with the force of about two knots, and the weather was fine with a slight haze. In these circumstances the tug and the keels proceeded across the Bell Mouth entrance under port helm to get on to an up-river course. While so proceeding, the *Australmead*, which had been swinging to starboard, ceased to swing but continued to come ahead towards the tug and tows, and the port side of the *Pioneer* came into collision with the stem of the *Australmead*. The blow was at about a right angle, the *Pioneer* heading about west and the *Australmead* heading athwart the river about north. The *Australmead* carried the *Pioneer* on her bow for a short distance, and the *Pioneer* then fell off and sank.

The plaintiffs contended that having given the turning signal the *Australmead* should have continued to turn round instead of coming athwart the river too far over to the north side. The defendants contended that the turning signal was an intimation to the tug and tows to keep out of the way, and that they ought to have starboarded and passed the *Australmead* starboard to starboard.

Stephens K.C. and *Sinclair Johnston* for the plaintiffs.
Bateson K.C. and *Dumas* for the defendants.

Cur. adv. vult.

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Oct. 31. HILL J. [after stating the facts set out above continued]: The *Australmead* having come up river at various speeds, and being substantially on the south side of the channel, when abreast of No. 12 buoy gave her turning signal and began to turn by putting the engines full ahead and the helm hard aport, and with her tug on the starboard bow. According to her logged times this was about three minutes before the collision. She had got heading about athwart (i.e., north or north by east) when the *Salvage* and her tows were seen. At the time of the collision she was on about the same heading and had not succeeded in getting more than athwart. The *Salvage* and her tows came away from the lock pit and out into the river, and turned under hard aport helm and had got heading up river by the time of the collision. The channel between the knuckle of the west pier of the Bell Mouth entrance of the Alexandra Dock and the line of buoys on the south side of the river is about 2000 feet wide.

The plaintiffs' case is that there was plenty of room for the *Australmead* to turn head to tide, as her signal indicated, and for the *Salvage* and keels at the same time to pass into the river and turn up river, but that the *Australmead* did not turn in a proper manner—that is, she swung too slowly and came too far to the north and at too great a speed. The defendants' case is that the *Australmead* turned in a proper manner and the *Salvage* ought to have passed the *Australmead* starboard to starboard and then turned up river, but instead ported across the bows of the *Australmead*.

I will at once dispose of the charge against the *Salvage* that she ought to have passed on the starboard side of the *Australmead*—that is, farther down river. Whether the *Salvage* and the *Australmead* were starboard to starboard when the *Salvage* started or the starboard side of the *Australmead* was to the port side of the *Salvage*, or whether they were end on, it seems to me, and I am so advised by the Elder Brethren, that it would have been wrong for the *Salvage* to attempt to pass to the eastward of the *Australmead*. The argument for the defendants treated these two ships as ships which were on courses and sighting one another starboard to starboard.

That is to ignore altogether the fact that the *Australmead* had given her turning signal; and, though the master of the *Salvage* had not heard it, he saw and knew that the *Australmead* was turning. She could be doing nothing else; the dock signals were against her and she could not be intending to enter the dock. The master of the *Salvage* was bound to suppose that the *Australmead* would continue to turn, and if he attempted to pass the *Australmead* on his starboard side and the *Australmead* continued to turn and head down river, as the master of the *Salvage* was entitled and bound to assume would be the case, he would be taking his line of keels across the bows of the *Australmead* on the flood tide. If anything had gone wrong the defendants would have been the first to say: "You knew the *Australmead* was turning and was already athwart and would shortly be heading down river, and yet you foolishly tried to pass on the down-river side." I should add that I do not believe that the *Australmead* and the *Salvage* ever were starboard to starboard. The defendants' case on this seems to me impossible.

If the *Salvage* was not wrong in not passing starboard to starboard, in what was she wrong? It must either be that she ought not to have started out at all or ought to have held back till the *Australmead* had turned, or ought to have kept closer to the north side. That brings me to r. 14 of the Humber Rules, upon which the defendants rely. So far as it is applicable (it deals both with steam vessels turning and with vessels not under command) it is as follows: "When a steam vessel is commencing to turn round . . . . she shall signify the same by four short blasts of the steam whistle in rapid succession, and it shall thereupon be the duty of the approaching vessel to keep out of the way of the steam vessel so situated. A steam vessel commencing to turn round shall, immediately before giving the signal referred to in this Rule, indicate the direction in which she proposes to turn, by sounding the one short blast or two short blast signals prescribed by Article 28 of the General Regulations."

That rule does not mean that by giving the signal the *Australmead* is entitled to hold up all the traffic. It is a notice

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that the *Australmead* is about to turn round; it imposes on the *Salvage* the duty to keep out of the *Australmead's* way while the *Australmead* is turning round; but it imports a correlative duty upon the *Australmead* to turn round—not merely to put herself athwart the stream and so continue—and to turn in a proper way, using no more water than is reasonably necessary for the purpose. At least, if she does use more water than is reasonably necessary she cannot complain that another ship has not given her more room, if that ship has given her all the room that was reasonably necessary. If there was ample space for the *Australmead* to turn round and at the same time for the *Salvage* and keels to come into the river and turn up river, the *Salvage* and keels were entitled so to do. They were equally entitled to assume that the *Australmead*, which had indicated that she intended to turn round, would turn round and get heading to the tide. The Elder Brethren advise me, and I think it is obvious, that there was ample room for the *Australmead* to turn round and at the same time for the *Salvage* and keels to come out and turn up river, if these manœuvres were properly carried out. The *Salvage* was therefore not wrong to start from the lock pit and to proceed into the river. So proceeding, and it being wrong for her to attempt to pass down river and to the starboard of the *Australmead*, she was bound to turn up river. Did she do so sufficiently close to the north side? Where in regard to the north side did the collision happen? The plaintiffs pleaded 50 feet from the West Knuckle. That is obviously wrong. The defendants pleaded 300 feet and that was their evidence. The master of the *Salvage* said 300 feet. Other estimates by the defendants' witnesses varied from 100 to 160 feet. I cannot fix the distance exactly, but I find that the place of collision was substantially less than 300 feet from the West Knuckle. I am not prepared to find that the *Salvage* proceeded farther out into the river than was safe and proper having regard to the fact that the *Australmead* had intimated that she was turning round. I find that the *Australmead* did not act properly. She began to turn round and got athwart, and then, instead

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of continuing to turn, she came on athwart and came too far over to the north side. I hold her to blame.

There is only one other point I need deal with. It was said that the *Salvage* was to blame for not whistling. Even if I found this as a fact (and the evidence is conflicting) it had nothing to do with the collision. Those on the *Australmead* knew that the *Salvage* was coming out, and ought to have expected that she would do what she did.

I pronounce the *Australmead* alone to blame.

Solicitors for the plaintiffs: *Pritchard & Sons, for Andrew M. Jackson, Hull.*

Solicitors for the defendants: *Botterell & Roche, for Hearfield & Lambert, Hull.*

E. C. M. T.

DIVORCE.

1923
Nov. 15, 21.

HARNETT *v.* HARNETT.

Restitution of Conjugal Rights—Sincerity of Applicant—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 17, 22—*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68).

The former doctrine of the Ecclesiastical Courts, and of the Divorce Court for some years after the Act of 1857, that there was no defence to a suit for restitution but a matrimonial offence by the petitioner, is not now law.

The petitioner must prove that he or she is sincere in desiring a return to cohabitation; but the mere intention to take proceedings for divorce if the order for restitution is not obeyed is not a proof of insincerity.

THE parties in this case were married on April 15, 1916; had lived together in Scotland and at Lisnacree House, Lisnacree, in County Down, Ireland. There was one child of the marriage, a boy, born on January 3, 1917. This petition was filed by the wife on April 12, 1922, alleging that her husband refused to live with her, and praying for restitution of conjugal rights. The husband was an officer in the Royal Air Force, stationed at the date of the petition at the headquarters of that force in London. During part of

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their married life the husband had been serving as a volunteer in the English forces in Ireland. The parties had never had a permanent home. They had lived together, with some violent quarrels, but on the whole not unhappily, in various places in England, and for some time with the wife's parents at their home in Ireland. In February, 1921, the wife had to go into a nursing home in Ireland for an operation. After she came out the parties did not live together; she alleged that the separation was wholly due to the husband's refusal to return; he contended that his wife's conduct and temper had caused the separation, and that he had always been willing to renew cohabitation. Neither party accused the other of any actual matrimonial offence.

The petition first came on before Hill J. on November 15; it was then part heard and adjourned to November 21, when the hearing was resumed.

At the close of the petitioner's evidence, Hill J. said that he was not satisfied that she was sincere in asking for restitution, and asked the respondent's counsel if he would take the responsibility of accepting a decision on that ground. Mr. Graham Mould said he desired a decision on that ground, and forbore from calling evidence on the husband's behalf.

W. O. Willis for the petitioner. A wife who asks for restitution of conjugal rights is entitled to a decree unless she has committed a matrimonial offence, or there is a binding separation deed pleaded by the husband. The Ecclesiastical Courts never required any evidence of sincerity: *Scott* v. *Scott* (1); *Oldroyd* v. *Oldroyd* (2); *Haswell* v. *Haswell and Sanderson.* (3) Some serious fault must be proved against the wife. In *Rippingall* v. *Rippingall* (4) Lord Hannen said he could not speculate on a wife's motives in asking for restitution.

In *Russell* v. *Russell* (5) the Court of Appeal only decided that there might be conduct on the part of a wife asking for

(1) (1865) 4 Sw. & Tr. 113.
(2) [1896] P. 175.
(3) (1859) 1 Sw. & Tr. 502.
(4) (1876) 24 W. R. 967; cited by Jeune P. in *Synge* v. *Synge* [1900] P. 180, 194.
(5) [1895] P. 315.

restitution of conjugal rights which would prevent the Court from granting it, though it was not sufficient to entitle the husband to a judicial separation. Neither in that case nor the Act of 1884 is there any mention of the petitioner's sincerity.

[He also referred to *Beer* v. *Beer*. (1)]

The effect of refusing a decree for restitution would be to leave the wife destitute, without any legal right to apply for maintenance.

[*Skinner* (amicus curiæ) mentioned a recent case in the Court of Appeal of *Palmer* v. *Palmer*. (2)]

Graham Mould for the respondent. The Court will not countenance a farce. A request found, as this has been, to be insincere, should not be held good in law.

[He referred to *Williams* v. *Williams* (3) and *Mann* v. *Mann*. (4)]

W. O. Willis in reply referred to the remarks of Horridge J. in *Pugh* v. *Pugh* (5), and to *Marshall* v. *Marshall* (6) and *Tress* v. *Tress*. (7)

HILL J. In this case the wife petitions for restitution of conjugal rights. At the end of the wife's evidence counsel for the husband submitted that the petitioner had not made out her case, because she had not proved that she had a sincere desire to return to her husband. I intimated that I was ready to decide the case on that ground, and counsel for the husband took the responsibility of having the case so decided without putting his client into the box. I am of opinion that the petitioner for restitution of conjugal rights should satisfy the Court that she sincerely desires the relief she asks, and that on the facts of this case she has not done so.

I have been referred to some cases where a different view has been taken, but I must act on my own opinions and leave

(1) (1906) 94 L. T. 704.
(2) [1923] P. 180 ; 156 L. T. Journal, 41 ; since reported 129 L. T. 665.
(3) [1921] P. 131, 133.
(4) [1922] P. 238.
(5) [1921] P. 136*n*.
(6) (1879) 5 P. D. 19.
(7) (1887) 12 P. D. 128.

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the Court of Appeal to correct me if I am wrong. I think there has been a change in the law as to the possible grounds of answer to a claim for restitution of conjugal rights since the time of the passing of the Matrimonial Causes Act, 1857. The case of *Scott* v. *Scott* (1) shows that there was then only one answer to a petition for restitution—namely, that the petitioner had committed a matrimonial offence. But the Court of Appeal in *Russell* v. *Russell* (2) decided that there may be a just cause for refusing a decree for restitution which does not amount to a matrimonial offence. There the burden of showing a cause was thrown on the respondent.

But more recent cases show that there is a further requirement—namely, that the petitioner must show that she is sincere in her request and willing to resume the position and duties of a wife. This was laid down by the President in *Williams* v. *Williams* (3) and *Mann* v. *Mann*. (4) And in the Law Times Journal report of *Palmer* v. *Palmer* (5) the judgment of the Court of Appeal is summarized as follows: "If the Court is satisfied of the bona fides of the petitioner she was entitled to a decree; there was strong evidence of such 'bona fides,' and the fact that she intended to have recourse subsequently to divorce proceedings was no disqualification of her right to a decree for restitution; the judge had not said he disbelieved the evidence given, which certainly showed bona fides, and bona fides was the essence of the right to relief."

That seems to me to confirm the judgments of the President to which I have referred. There must in my opinion be a sincere desire to obtain not merely the form of cohabitation, but the reality of conjugal rights; and that implies readiness to render them to the other spouse. A wife petitioner must be ready to live on terms of affection with her husband. I do not think sincerity in this sense is inconsistent with her intending to take other proceedings if the husband persists in his refusal. In this case, from the evidence and demeanour

(1) 4 Sw. & Tr. 113.
(2) [1895] P. 315.
(3) [1921] P. 131, 133, 135.
(4) [1922] P. 238.
(5) [1923] P. 180; 156 L. T. Journal, 41; 129 L. T. 665.

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of the wife, I am clearly of opinion that there is no sincere desire on her part to receive and render the rights and duties of ordinary matrimonial cohabitation. I am confirmed in this by what happened in 1920, when there seems to have been a reconciliation, genuine on the part of the husband, but shown by the wife's own letters to have been on her part a conscious sham. I think her attitude is still the same, and that there is no desire on her part to resume real married life. I think that what she wants is a formal decree and not restitution itself ; and I hold, therefore, that there is an absence of that bona fides which has been held to be of the essence of the right to relief. I must, therefore, dismiss the petition. The wife will have her costs.

Solicitors for petitioner : *Leman, Chapman & Harrison, for E. & R. D. Bates, Belfast.*

Solicitors for respondent : *Hargreaves & Crowthers.*

J. R. B.

[IN THE COURT OF APPEAL.]

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June 25, 26 ; *July* 23.

EUSTACE *v.* EUSTACE.

Judicial Separation—Jurisdiction—Domicil—Residence—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 16, 17, 22, 27, 41, 42—*Matrimonial Causes Act,* 1884 (47 *&* 48 *Vict. c.* 68), *s.* 5.

There is jurisdiction in the Probate, Divorce and Admiralty Division to decree judicial separation at the suit of the wife where the husband is domiciled in England, although at the date of the institution of the suit he is not resident in this country.

Decision of Horridge J. reversed.

Graham v. *Graham* [1923] P. 31 distinguished.

APPEAL from a decision of Horridge J.

This was a wife's petition for a decree of judicial separation on the ground of her husband's desertion of her by failing to comply with a decree for restitution of conjugal rights. The parties were married in Edinburgh in 1915. The respondent was the son of parents living in England. There was cohabitation at various places in England until 1920,

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when he left the petitioner and went to Ireland with another man's wife. In May, 1922, the wife obtained a decree for restitution of conjugal rights, which was served on the respondent in Ireland on June 2, 1922, but he had not complied therewith. She then filed her petition for judicial separation, alleging domicil of the parties in England. At the hearing evidence was given of that domicil.

Horridge J., following his own decision in *Graham* v. *Graham* (1), dismissed the petition on the ground that he had no jurisdiction to decree judicial separation, because at the institution of the suit the respondent was not resident in England.

The petitioner appealed.

Cotes-Preedy for the appellant. Horridge J. was wrong in holding that he had no jurisdiction to entertain the petition: Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 6, 7, 16, 17, 27, 41, 42; Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5.

The learned judge felt himself bound by his own decision in *Graham* v. *Graham* (1), but that does not govern the present case. Here the appellant is domiciled within the jurisdiction. Judicial separation does not depend upon residence only; domicil is sufficient to give jurisdiction: *Rush* v. *Rush*. (2) Here the respondent is clearly domiciled in this country, and the Court has complete jurisdiction to grant the decree asked for, although he is resident in Ireland.

[The following authorities were also referred to: *Donegal* v. *Donegal* (3); *Wilson* v. *Wilson* (4); *Armytage* v. *Armytage* (5); *Le Mesurier* v. *Le Mesurier* (6); *Anghinelli* v. *Anghinelli* (7); *Yelverton* v. *Yelverton* (8); *Carden* v. *Carden* (9); and Dicey on the Conflict of Laws, 2nd ed., pp. 265, r. 50, and 266.]

The respondent was not represented.

(1) [1923] P. 31.
(2) [1920] P. 242, 258.
(3) (1821) 3 Phil. 586, 597.
(4) (1872) L.R. 2 P. & M. 435, 442.
(5) [1898] P. 178.
(6) [1895] A. C. 517.
(7) [1918] P. 247.
(8) (1859) 1 Sw. & Tr. 574, 586.
(9) (1837) 1 Curt. Eccl. 558.

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THE PRESIDENT (SIR HENRY DUKE). This is an appeal from the Probate, Divorce and Admiralty Division against an order of Horridge J. dismissing for want of jurisdiction a suit in which judicial separation was claimed by a wife on the ground of her husband's desertion of her by failure to comply with a decree of the Court for restitution of conjugal rights, the wife's petition being framed in accordance with the provisions of the Matrimonial Causes Act, 1884, s. 5.

The parties were married in Scotland in 1915. The respondent was the son of parents living in England. There was cohabitation at various places in England until 1920, when the respondent, as was said, removed to Ireland with the wife of another man. The petitioner in 1922 filed her petition for, and obtained, a decree of restitution of conjugal rights, which was disobeyed, and in due course she filed her petition for judicial separation. Therein she alleged domicil of the parties in England. The petition was duly served, but the respondent did not appear. At the hearing some evidence as to domicil was given.

The petitioner's suit was dismissed by Horridge J. on the ground of want of jurisdiction. In the course of the hearing the learned judge summed up the view of the law on which he acted in this statement: Divorce depends upon domicil and not residence; judicial separation depends upon residence only. The learned judge held himself bound by his earlier decision in *Graham* v. *Graham*. (1)

The facts in the present case differ from those in *Graham* v. *Graham* (1) in that there was there neither domicil nor residence of the parties on which to found jurisdiction, but the reasons of the judgment as reported are in effect those on which the learned judge declined jurisdiction here. Counsel for the petitioner pointed out upon the hearing of this appeal some anomalous consequences which would seem to follow from the rejection of the petitioner's suit for want of jurisdiction. Upon proof of the respondent's alleged adultery, as well as the alleged desertion, she would have been entitled at her choice, as was said, to a decree of

(1) [1923] P. 31.

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dissolution of marriage or of judicial separation. She would certainly have been entitled to a decree of dissolution. The Matrimonial Causes Act, 1884, when construed with the Matrimonial Causes Act, 1857, empowers a wife deserted by her husband to claim judicial separation, and it does not appear that there is any other than an English forum in which she can obtain that relief, so that so long as the respondent remains abroad she cannot proceed. These are no doubt practical considerations, though they do not materially help in the decision of the petitioner's appeal. This depends in substance upon the construction of the clauses in the Matrimonial Causes Act, 1857, which created the Court for divorce and matrimonial causes and granted to it the jurisdiction which, under the Judicature Act, was transferred to the Probate, Divorce and Admiralty Division.

The argument in favour of the limitation of jurisdiction in respect of judicial separation to cases in which the respondent is resident in England is founded in the main upon two facts: first, that the Ecclesiastical Courts could only grant decrees of divorce a mensa et thoro in such cases; and, secondly, that this jurisdiction was transferred to the newly established Court by the Act of 1857, with a direction that, in suits and proceedings other than proceedings for divorce, the principles and rules on which the Ecclesiastical Courts had acted should, subject to certain statutory qualifications, continue to be observed. To examine in detail the numerous cases which establish the limited nature of the jurisdiction of the Ecclesiastical Courts is unnecessary. Every Ecclesiastical Court in England was restricted by the common law to its prescribed area of operation. Moreover, by the Statute of Citations, 1531 (23 Hen. 8, c. 9), it was enacted for the prevention of abuses, which, it was said, had grown up in usurpation of power in the provincial Courts, that "no manner of person shall be from henceforth cited or summoned . . . . to appear before any . . . . judge spiritual out of the diocese or peculiar jurisdiction where the person . . . . shall be inhabiting and dwelling at the time of awarding or giving forth of the same citation or summons."

No Ecclesiastical Court in England could have entertained a suit of the petitioner for a decree of divorce a mensa et thoro while her husband was resident in Ireland, and this is demonstrated in various decisions of dates before and since 1857, which were cited in *Graham* v. *Graham*. (1) Apart from that case there was stated to us to be no direct authority for the proposition there enunciated, though the principles involved have been often discussed. It is advisable, however, before examining the cases cited in *Graham* v. *Graham* (1) or the authorities bearing upon the matter, to see what are the express provisions of the Act of 1857.

The Matrimonial Causes Act, 1857, established in this country a new Court of record to which it transferred the jurisdiction in matrimonial causes which had theretofore been exercised by the ecclesiastical tribunals, and to which it also gave certain other and new jurisdictions. The matters subject to the power of the Court being thus determined, the statute states with absolute generality who are the persons over whom, in respect of the ascertained subjects, the Court shall have authority. A decree of dissolution of marriage, under s. 27, may be obtained by "any husband" or "any wife" having in fact the grounds of complaint upon which dissolution of marriage may be decreed. A sentence of judicial separation may, under ss. 16 and 17, be obtained by "the husband" or "the wife" having the statutory grounds of complaint, and by "either husband or wife."

Legal principles now well ascertained are applied to determine generally the limitations which are imposed by law upon the jurisdiction given by a State to its domestic tribunals. The judgments in *Le Mesurier* v. *Le Mesurier* (2) and in *Bater* v. *Bater* (3) show, for example, with regard to divorce, that the jurisdiction of the Probate, Divorce and Admiralty Division is, as the jurisdiction of the Court for matrimonial causes was, limited in respect of persons to persons domiciled in England. The principle which determines what persons are subject to the jurisdiction of His Majesty's Courts in other

(1) [1923] P. 31. (2) [1895] A. C. 517.
(3) [1906] P. 209.

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matrimonial causes is, I think, that stated in the House of Lords in *Udny* v. *Udny* (1) and in *Bell* v. *Kennedy*. (2) Broadly it is this, that questions which arise with regard to the personal rights and relations are properly determinable by the Courts of the domicil of the party. Lord Hatherley L.C. in *Udny* v. *Udny* (1) says (3) that by domicil the party acquires a certain status civilis which subjects him and his property to the municipal jurisdiction of his place of domicil. Lord Chelmsford in the same case speaks of domicil as identifying the municipal jurisdiction to which recourse is had for the purpose of determining any question which may arise as to the party's personal rights and relations. Lord Westbury expressed his opinion in *Udny* v. *Udny* (1) to the like effect, and in *Bell* v. *Kennedy* (2) the noble Lord last named said that the law of the country of the domicil of a person is attached to his person and remains attached wherever he goes until he ceases to be so domiciled.

The Legislature having by the Act of 1857 invested the Court in question with what is prima facie a general jurisdiction in certain matters of personal status and of personal relationship, what is there in the statute which confines the exercise of the jurisdiction within narrower bounds than those set by the application of the test of domicil? Sect. 22 of the Act of 1857 prescribes that in causes other than proceedings for divorce the Court is to proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions of the Act and of rules and orders thereunder. That this section restricts the jurisdiction of the Court over persons to the jurisdiction which the Ecclesiastical Courts possessed is an impossible contention. Sect. 42 of the statute indeed excludes this idea by enacting that in matrimonial causes other than divorce the petition which commences a suit "shall be served on the party to be affected thereby, either

(1) (1869) L. R. 1 H. L. Sc. 441. (2) (1868) L. R. 1 H. L. Sc. 307.
(3) L. R. 1 H. L. Sc. 449.

within or without Her Majesty's dominions." It is worth while, too, to recall that relief by decree of judicial separation for desertion was a form of relief not known to the Ecclesiastical Courts. I think the change in the status of a woman for which ss. 25 and 26 of the Act provide was not only unknown to the Ecclesiastical Courts but was such as none of the Courts of the realm could previously have decreed. Sect. 22 of the Act of 1857 is not in truth restrictive of the jurisdiction granted by the Act. It directs the mode in which the jurisdiction shall be exercised. To treat it as limiting the classes of causes with which the Court is to deal is to disregard the effect of the Act as a whole. To treat it as imposing a condition of residence analogous to that of the Statute of Citations is to disregard the terms of s. 42.

There being created by the Act of 1857, in its prima facie meaning, a general jurisdiction in matrimonial causes over persons domiciled within the realm it is necessary to see whether upon petition for judicial separation there is authority binding upon this Court which narrows the jurisdiction so as to include only persons resident. I know of none. There is, on the other hand, a series of judgments which seem to me to support the view that in such cases there is jurisdiction where there is domicil, and that there may be jurisdiction without domicil if there is residence. Sir Cresswell Cresswell J.O., in a well known case of *Yelverton* v. *Yelverton* (1), where a decree of nullity was claimed against a respondent not resident in the jurisdiction, said that unless some ground could be discovered for saying that the respondent was domiciled in England he was not subject to the jurisdiction. Sir Francis Jeune P. in *Christian* v. *Christian* (2) stated in plain terms that a suit for judicial separation may be founded upon matrimonial residence as distinguished by our law from domicil, but that "domicile gives jurisdiction not only in suits for dissolution but likewise in suits for judicial separation." In *Firebrace* v. *Firebrace* (3) Sir James Hannen P. considered the questions which underlie

(1) 1 Sw. & Tr. 586. (2) (1897) 78 L. T. 86, 88.
(3) (1878) 4 P. D. 63, 67.

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the present case—the general rule as to the jurisdiction of the Court, the legal limitations which, in 1857, governed the powers of the judges in the Ecclesiastical Courts, and the effect of s. 42 of the Act of 1857 as regards the exercise of the jurisdiction over persons neither domiciled nor resident. The learned President also discussed the effect of this section with some particularity in its operation in suits for restitution of conjugal rights, and expressed certain views which have since had to be considered in the light of the effect on such suits of the provisions of the Matrimonial Causes Act, 1884, s. 5. This is on the present occasion immaterial. The broad principle which Sir James Hannen deemed to govern the jurisdiction is expressed in this statement which the learned President applied to both divorce and judicial separation : " The domicil of the wife is that of the husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicil."

In *Dicks* v. *Dicks* (1) Lord Gorell (then Barnes J.) found it necessary to consider whether a decree of restitution of conjugal rights could properly be served on a husband of English domicil who was resident in Ireland, and held that the fact of English domicil was decisive of the case, and that the service was good. *Bateman* v. *Bateman* (2) again, was a suit for restitution of conjugal rights against a husband resident in the United States of America, and at successive stages of the case the President (then Sir Francis Jeune) and Barnes J. (1) acted upon the view that upon proof of an English domicil the suit was well constituted and within the jurisdiction of the Court. In *Perrin* v. *Perrin* (3) Sir Samuel Evans P. stated in a considered judgment that, given domicil, there is jurisdiction in such cases, although there be no residence. *Penny* v. *Penny* (4), decided after argument in 1922, was mentioned at the hearing, and upon examination of the record and notes proves to be an act on petition in a suit for judicial separation where, upon proof of English domicil, the suit was allowed to proceed,

(1) [1899] P. 275.
(2) [1901] P. 136.
(3) [1914] P. 135.
(4) (1922) Unreported.

although the respondent, who was temporarily in England, alleged, no doubt truly, that his place of residence was in the Straits Settlements.

It is unquestionable that successive judges in the Probate, Divorce and Admiralty Division have from time to time in various cases other than suits for dissolution of marriage acted upon the view that domicil of the parties confers jurisdiction. But that this Court should, upon an undefended petition for judicial separation, determine any wider questions than those which are necessarily raised would be manifestly inconvenient. I therefore refrain from expressing upon this occasion any concluded view as to the character and limits of the jurisdiction of the Probate, Divorce and Admiralty Division in causes other than those of divorce and judicial separation. What is in question here is a wife's claim for judicial separation. The true view of the Matrimonial Causes Act, 1857, with regard to proceedings for judicial separation, is, in my opinion, that which was acted upon by various learned judges to whose decisions I have referred. Domicil gives jurisdiction to decree judicial separation, and the jurisdiction also arises where there is residence of the respondent. There was in this case proof of domicil. There was therefore jurisdiction to entertain the suit and to grant to the petitioner the relief which she sought.

WARRINGTON L.J. I agree with the learned President's judgment. I only wish to say that in this case the provisions of s. 22 of the Act of 1857 do not help the respondent or justify the order of Horridge J. It is true that the Ecclesiastical Courts had no jurisdiction over persons not resident within their ambit, and accordingly did not pronounce decrees of divorce a mensa et thoro in such cases; but this arose not from any rule or principle acted upon by those Courts, but from the provisions of the general law of the land restricting their jurisdiction.

In *Anghinelli* v. *Anghinelli* (1) s. 22 was properly relied upon, because there the question was whether, the condition

(1) [1918] P. 247.

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of residence being satisfied, the Ecclesiastical Courts would have exercised the jurisdiction without proof of domicil. This depended upon the rules and principles acted upon by those Courts.

ATKIN L.J. I agree with the judgment which has been delivered by the President. I only desire to add that the reason which leads me to hold that domicil gives jurisdiction in suits for judicial separation is that, in my view, the provisions of ss. 25 and 26 of the Matrimonial Causes Act, 1857, affect the status of the spouses after decree. So to hold is not inconsistent with the view taken by the Courts hitherto, that residence is also sufficient to found jurisdiction in such cases. What the effect of s. 26 may be in the country of domicil, where jurisdiction has been founded on residence only, it is unnecessary in the present case to determine. I further wish to emphasise that this decision reserves the case of a claim for restitution of conjugal rights. Whether there is any jurisdiction to order a domiciled Englishman bona fide resident abroad at the date of commencement of suit to render conjugal rights abroad, or, as the ordinary form of decree runs, to return home and render conjugal rights, seems to me to be a question of difficulty that does not arise in the present case.

Appeal allowed.

Solicitors : *Blyth, Dutton, Hartley & Blyth.*

G. A. S.

ADMIRALTY.

1923
July 9, 16;
Dec. 21.

THE RUSSLAND.

Shipping—Salvage—Ship Repairers—Priorities—Claim to share in Bail provided in another Action.

A vessel which had stranded on rocks and sustained heavy damage got off with the assistance of various salvors and was placed in dock for temporary repairs. In respect of these services various salvage actions and an action by the ship repairers for salvage and/or necessaries were instituted. No defence was put in, but in the first action an appearance was entered and an undertaking given to put in bail for ship, cargo and freight in the sum of 1000*l.* The cargo and freight were valued at 327*l.* Before the other actions were instituted the cargo had been landed and dispersed. After some temporary repairs had been effected the vessel was sold by the marshal. She only realized 889*l.* The ship repairers, whose claim for salvage was disallowed, claimed that the amount expended by them should be allowed as against the other salvors:—

Held, that a ship repairers' claim ranks after maritime liens already accrued, and that, although all the salvors had benefited, there was no principle by which the ship repairers' claim could be preferred to those of the salvors:—

Held further, that the bail for cargo and freight did not constitute a fund in which all the salvors could share; the undertaking was given in one action only, and the plaintiffs in that action, in which the total values were 1217*l.*, could treat $\frac{327}{1217}$ of 1000*l.* as bail representing the cargo and freight.

Motions for judgment and to determine priorities in a number of actions in rem for salvage.

The plaintiffs, in the order of their respective writs, were as follows:—

(1.) The owners, master and crew of the pilot cutter *Coytobee*;

(2.) The Tees Towing Company, Ld., as owners of the tug *Laceby*, and as having done various salvage operations;

(3.) Pilot Dixon;

(4.) The Cleveland Shipping and Lighterage Company, Ld.;

(5.) The Tees Towing Company, as owners, and the masters and crews of the tugs *Florence* and *Ironopolis*;

(6.) Smiths' Dock Company, who claimed in respect of salvage services alleged to have been rendered in dock and/or

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for 245*l.* 17*s.* for necessaries supplied to the defendants' steamship, the *Russland*.

There was no defence to any of the actions, but in the first action an appearance had been entered by the defendants, the owners of the steamship *Russland*, her cargo and freight, and there was a solicitors' undertaking in that action to put in bail in respect of ship, cargo and freight to the amount of 1000*l.* The services consisted in getting the *Russland* off the rocks near the entrance to the River Tees, towing her up the river, putting her on the hard, discharging cargo, pumping and effecting temporary repairs. The *Russland* was ultimately sold under order of the Court, but only realized, after deduction of expenses, 889*l.* 8*s.* 6*d.*

J. R. E. Cunliffe for the *Coytobee*.

E. A. Digby for the Tees Towing Company and the masters and crews of the tugs *Florence* and *Ironopolis*.

G. Langton for pilot Dixon.

Geoffrey Hutchinson (*J. B. Aspinall* with him) for the Cleveland Shipping and Lighterage Company.

Clement Davies for Smiths' Dock Company.

[The arguments sufficiently appear from the judgment. In support of the contention of the Cleveland Shipping and Lighterage Company that all the salvors could claim against the bail provided in the first action *The Joannis Vatis* (1) was referred to.]

Cur. adv. vult.

Dec. 21. HILL J. read the following judgment. This is an unfortunate case. There are many claims to a very small fund. The paucity of money is ill compensated for by the multiplicity of points involved. The *Russland* was a small steamer of 680 tons gross, and carried a cargo of kainit in bulk and bags, and of potash of salt in bulk. On March 15, 1923, she stranded on the rocks to the southward of the River Tees. As was afterwards discovered, she there received very serious bottom and other damage. She was got off,

(1) [1922] P. 92.

towed up river, and placed at a buoy. Found to be making water, she was put on a hard, part discharged, holes plugged, and she was pumped out. She was then moved to Smiths' dry dock and temporarily repaired. After all these services had been rendered and much expense incurred, she was arrested and sold under the order of the Court. She realized gross 1137*l.* 13*s.* 6*d.*, and net, after deducting marshal's expenses, 889*l.* 8*s.* 6*d.* The expenses include a payment to Smiths' Dock Company for pumps and pumping from the date of arrest, April 6, to delivery to the purchaser on May 22.

Writs claiming salvage were issued as follows: fol. 165, March 15, owners, masters and crew of the pilot cutter *Coytobee*; fol. 181, April 4, the Tees Towing Company, Ld., as owners of the salvage tug *Laceby* and as having done various salvage operations; fol. 193, April 7, Mr. Dixon, pilot; fol. 204, April 9, the Cleveland Shipping and Lighterage Company, Ld.; fol. 180, April 13, the owners, masters and crews of the tugs *Florence* and *Ironopolis*. The owners of these tugs are the Tees Towing Company, who are also the plaintiffs in fol. 181. Smiths' Dock Company also issued a writ, fol. 338, in July. They had already intervened in fol. 181 setting up a possessory lien. The Tees Towing Company intervened in fol. 193. No appearance was entered by the defendants except in fol. 165, and in that no defence was delivered. The suits are therefore all in default.

The main contests as to liability were directed to the claims of Dixon and of Smiths' Dock Company as salvors. I also had to be satisfied with regard to each of the claims upon the affidavits as to the nature of the claims. Everybody however took part in a contest as to priorities. The fund in Court represents only the ship. The marshal was never instructed to arrest either the cargo or freight. The cargo, or what was of any value, had been landed before the date of the writs except the first, fol. 165. In that action by the *Coytobee* a solicitor's undertaking to put in bail to answer ship, cargo and freight to the amount of 1000*l.* was given, and the plaintiffs in that action must therefore be taken as having

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a claim against so much of the bail as represents cargo and freight, as well as against the proceeds of the ship. The only figures I have are a statement in the defendants' solicitors' letter giving values as follows: "Cargo 151*l.* 8*s.* Freight 176*l.* 10*s.* 5*d.* Total 327*l.* 18*s.* 8*d.*" This, added to the realized value of the ship—889*l.* 8*s.* 6*d.*—gives a total of 1217*l.* 7*s.* 2*d.* In my opinion $\frac{327}{1217}$ of 1000*l.* must be treated as bail representing cargo and freight—say 268*l.* These plaintiffs therefore have a claim against the ship, value 889*l.*—and bail representing cargo and freight, 268*l.* The other plaintiffs have a claim only against the ship, value 889*l.* It was argued that others besides the *Coytobee* could claim against the bail for cargo and freight. I do not agree. That undertaking to put in bail was given only to answer the claim of the *Coytobee*, and there was no undertaking to answer any one else's claim.

[His Lordship detailed the services of the respective plaintiffs, and continued:] As to the Cleveland Shipping Company, Ld., I am upon their affidavit unable to find that the work they did—discharging the cargo into lighters—was done upon "no cure no pay" terms, and the essential element of a salvage claim is therefore wanting. The work mainly benefited the cargo, and the fact that they did not cause the cargo to be arrested confirms the view that their claim was not for salvage but for work and labour done. It conferred some benefit on the ship, but unless done on "no cure no pay" terms does not give them a right to a salvage award. I think they must look to the persons who employed them; upon their affidavit they seem to have a good claim.

Smiths' Dock Company took the ship into their dry dock from March 19 to 22, and discharged part of the cargo and did temporary repairs. On March 22 the ship was moved to their fitting-out quay, and pumps and men were supplied. On March 28 they moved her back to the dry dock and did further temporary repairs to enable the ship to float; she was moved out on April 5, and lay at their fitting-out quay till delivered to the purchaser. As to all the work, except from

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March 28 to April 5 it was done at request, and I can see nothing to suggest that it was done on "no cure no pay" terms. In respect of that, Smiths' Dock Company have a claim in the nature of a quantum meruit against the person who employed them and had a possessory lien subject to the priorities, if any, of other persons. As to the period between March 28 and April 5, the dry docking repairs were not at request; but, in my opinion, they were done to protect the dock company's lien and not as volunteer salvors. I do not think Smiths' Dock Company earned salvage. The whole of their claim is for work done, supported by a possessory lien. As to the possessory lien, the law is clear that the repairer takes subject to salvage liens already accrued. In my opinion that follows from *The Immacolata Concezione* (1) (wages); *The Gustaf* (2) (wages); and *The Tergeste* (3) (wages and disbursements). It was suggested, on the authority of a passage in Halsbury's Laws of England, vol. xxvi., pp. 624–5, that because work has benefited the salvors it can be allowed as against them. The authority referred to is *The Aline* (4), cited in *The Bold Buccleugh*. (5) But however fair it may be that the salvors should recognize Smiths' claim, I can find no principle in law which enables me to prefer this claim to an accrued maritime lien for salvage.

I award to the *Coytobee* the sum of 66*l*. That includes their expenses. 50*l*. of this they will recover against the ship; they must get the remaining 16*l*. out of the bail for cargo and freight. I award Dixon 25*l*. I award the Tees Towing Company in respect of the *Florence* and the *Ironopolis* and the masters and crews of those two tugs a total of 200*l*. (fol. 180). In fol. 181 I give the Tees Towing Company in respect of the *Laceby* and other work 375*l*.—I have made that a round figure—of which 202*l*. is for the work of the Tees Company and the *Laceby*, and 173*l*. is in respect of the out of pocket expenses. That makes a total of 666*l*., of which 650*l*. will rank against the ship and 16*l*. against

(1) (1883) 9 P. D. 37.
(2) (1862) Lush. 506.
(3) [1903] P. 26.
(4) (1839) 1 W. Rob. 111.
(5) (1851) 7 Moo. P. C. 267, 285.

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freight and cargo. There is no competition between the salvors, but if there had been I think that they all should rank pari passu. In my view, their efforts were directed to a common object, and not to separate salvages in which one took priority to the other. Each will have costs, but I allow only one set of costs in fols. 180 and 181. There is no excuse, in my mind, for there being separate actions where the plaintiffs are the Tees Towing Company and their tugs the *Florence*, *Ironopolis* and *Laceby*. They all ought to have been joined in one action. If there is a balance it will go to Smiths' Dock Company, not exceeding the sum of 245*l.* 17*s.*, which is the amount for which they have got a possessory lien, and their costs. The vessel was sold in the Tees Towing Company's action (fol. 181), and if need be the plaintiffs in that action will have priority for their costs up to the date of the sale.

Solicitors for the *Coytobee*: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

Solicitors for the Tees Towing Company, and tugs *Laceby*, *Florence*, and *Ironopolis*: *Downing, Middleton & Lewis, for Middleton & Co., Sunderland.*

Solicitors for pilot Dixon: *Holman, Fenwick & Willan, for Meek, Stubbs & Barnley, Middlesbrough.*

Solicitors for the Cleveland Shipping and Lighterage Company: *Charles Russell & Co., for S. F. Thompson, Middlesbrough.*

Solicitors for Smiths' Dock Company: *Crossman, Block, Matthews & Crossman, for Hedley & Thompson, Sunderland.*

E. C. M. T.

ADMIRALTY.

1923
Nov. 2;
Dec. 21.

THE CHRISTEL VINNEN.

Shipping—Damage to Cargo—Bill of Lading—Unseaworthiness—Defective Rivet—Failure to pump—Damage caused partly by Unseaworthiness and partly by excepted Perils—Division of Loss.

A defective rivet allowed water to flow into the defendants' vessel. Had the pumps been duly sounded the leakage would have been discovered and the inflow of water kept under. The plaintiffs' cargo was damaged by the sea-water. The bill of lading incorporated the terms of a charterparty containing the exception "perils of the sea . . . . even when occasioned by negligence. . . . ." :—

Held, that, although the vessel was unseaworthy, the defendants could rely on the exception for so much of the damage as was caused by the failure to pump, and that the plaintiffs could only recover that proportion of the damage (estimated at 50 per cent.) which was caused by the first inflow of water due to the unseaworthiness—i.e., the damage done before the time when, but for the negligence, the inflow of water would have been detected and countered.

THE plaintiffs, as holders of a bill of lading of a cargo of maize laden on board the defendants' schooner *Christel Vinnen*, claimed the amount of the damage sustained in respect of the non-delivery of about half the bill of lading quantity, and delivery in a damaged condition of the remainder. The loss and damage arose owing to an inflow of sea-water into the bilges through a rivet hole in the port bilge.

The bill of lading incorporated the terms of a charterparty containing the following exception clause: "The steamer shall not be liable for loss or damage occasioned by . . . . perils of the sea . . . . or any latent defects in hull . . . . by collision, stranding or other accidents in the navigation of the steamer, even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners or other servants of the shipowner. . . . ."

The facts are summarized in the headnote and are fully set out in the judgment.

Stephens K.C. and *W. Van Breda* for the plaintiffs. The fact that the rivet had dropped out shows that it was defective,

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and the defendants have not established that it was a latent defect. The cause of the damage was the entry of sea-water owing to the defective rivet. The vessel, therefore, was unseaworthy when the voyage began, and the defendants, accordingly, cannot rely on the exceptions in the bill of lading: *The Glenfruin* (1); see also Lord Sumner's observations in *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (2); *The Dimitrios Rallias* (3); and Carver's Carriage of Goods by Sea, 6th ed., s. 17. The shipowner undertakes absolutely that the vessel shall be fit to carry the cargo.

[HILL J. The negligent failure to sound the pumps appears to have been the cause of the damage.]

The defendants cannot rely on the exceptions, "perils of the sea" or "accidents of navigation . . . . occasioned by negligence." All the exceptions go, once unseaworthiness has been established.

[HILL J. Not unless the damage was caused by the unseaworthiness: *The Europa.* (4)]

It was not reasonable on a vessel of the class of the *Christel Vinnen* to require the pumps to be sounded every few hours. She was under sail and would roll considerably, and the bulk of the damage could have been done between two periods of sounding. It is for the defendants to prove that the damage was caused by, and happened after, a neglect to sound the pumps.

[*Ingram & Royle, Ld.* v. *Services Maritimes du Tréport* (5); *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (6); and *The Cargo ex Laertes* (7) were also referred to.]

Bateson K.C. and *G. St. C. Pilcher* for the defendants. The damage was caused by a peril of the sea and there is no evidence of unseaworthiness. The defect was latent, and a latent defect in hull is one of the excepted perils on which the defendants can rely: cf. *The Cargo ex Laertes.* (7) The damage, however, was not caused by the defective rivet.

(1) (1885) 10 P. D. 103.
(2) [1922] 2 A. C. 250, 260.
(3) (1922) 16 Asp. M. L. C. 62.
(4) [1908] P. 84.
(5) [1913] 1 K. B. 538.
(6) [1907] 1 K. B. 660.
(7) (1887) 12 P. D. 187.

A prudent seaman would have sounded the pumps at frequent and regular intervals, in which case the water would never have reached the cargo at all. The damage was caused by the negligent failure to pump, and from that negligence the defendants are protected even if the vessel was unseaworthy: *The Europa.* (1) The facts in the present case are very similar to those in *The Cressington* (2) and *The Southgate* (3), where the exception clauses were in almost identical words. *The Glenfruin* (4) and *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (5) are merely authorities for the proposition, which is not disputed, that if the real cause of the damage was unseaworthiness the defendants cannot rely on other exceptions. *The Dimitrios Rallias* (6) is no authority at all, for in that case it was an express term of the contract that the excepted perils were conditional on the vessel being seaworthy.

[Reference was also made to *Owners of Cargo on board SS. Waikato* v. *New Zealand Shipping Co.* (7)]

Stephens K.C. in reply. Both in *The Cressington* (2) and *The Southgate* (3) the vessels were seaworthy. The *Christel Vinnen* was not seaworthy; the unseaworthiness caused the inflow of water and was the cause of the damage.

Cur. adv. vult.

Dec. 21. HILL J. read the following judgment: The plaintiffs as holders of a bill of lading of a cargo of maize, dated December 9, 1922, sue the owners of the German ship *Christel Vinnen* in respect of non-delivery of about half of the bill of lading quantity, and delivery in damaged condition of the other half. The *Christel Vinnen* was a motor five-masted schooner built in 1922 by Krupps at Kiel. After being taken over from the builders she went in ballast to the River Plate. She began loading at San Nicolas on December 1, and sailed on December 10 for the Azores for orders. At

(1) [1908] P. 84.
(2) [1891] P. 152.
(3) [1893] P. 329.
(4) 10 P. D. 103.
(5) [1922] 2 A. C. 250.
(6) 16 Asp. M. L. C. 62.
(7) [1898] 1 Q. B. 645.

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8.50 A.M. on December 20 it was discovered that she had nine feet of water in her. She put into Rio de Janeiro as a port of distress on December 24. Her cargo was discharged. Part was condemned. The rest was re-shipped after repairs to the ship, and she proceeded on the voyage. At the Azores she was ordered to Belfast. On discharge at Belfast the re-shipped cargo was found more or less damaged. It was agreed at the hearing that the questions as to the short delivery, and the damaged delivery, were the same, depending alike on the liability for what happened on or about December 20. The plaintiffs do not now contend that they suffered damage by a separate breach of contract or duty by the defendants in relation to the re-shipping of the salved portion of the cargo at Rio. Their case is that the loss and damage were caused by the unseaworthiness of the ship from the time she began to load at San Nicolas.

The defendants denied the fact of unseaworthiness, but their real case was (1.) that the warranty was qualified by an express exception of latent defects in hull, and the defect was latent, and (2.) that the whole or at any rate part of the damage was caused, not by the unseaworthiness which let in the water, but by the negligence of those on board in not discovering the inflow in time to prevent it doing mischief. They relied on the exceptions in the bill of lading of perils of the sea, and collision, stranding or other accidents in the navigation of the ship, even when occasioned by negligence. At Rio, after the cargo had been discharged, it was found that the water had entered by a rivet hole in the port bilge amidships, in the third strake at frame 70. This was in the bottom of the ship, and water would have to rise in the bilges before it could overflow them and reach the cargo. The rivet which had filled this hole had disappeared, at any rate no part of it was found. It must have come away from the hole some time between leaving San Nicolas and December 20. It is admitted that it must have been in some way defective. There was nothing in the weather to account for the breaking of a sound rivet, and the fact that there were no signs of straining upon any of the surrounding rivets

shows that the breaking of the rivet was due to some defect in it and not to abnormal straining of the ship. Such a defective rivet made the ship unfit to encounter the ordinary perils of the voyage, that is made the ship unseaworthy. If it be a question for the Elder Brethren, I have put to them a question based upon a test suggested in Carver's Carriage of Goods by Sea and adopted by Channell J. in *McFadden* v. *Blue Star Line* (1): "Would a prudent owner, had he known of the defect, have required that it should be made good before he loaded the maize?" Their answer is "Yes." Conflicting evidence was given by the experts on either side as to whether there could be a defect in a rivet not discoverable by examination. But it is common ground that there might be defects which would be discoverable by examination. What the particular defect was could not be proved. The evidence from the builders does not satisfy me that this particular rivet was examined and no defect found. It is possible that the rivet was missed in the general examination. The case cannot be put higher for the defendants than that it is left in doubt whether the defect was latent or patent. It was not proved that it was latent. The defendants do not bring themselves within *The Cargo ex Laertes* (2), on which Mr. Bateson relied. So far, there is proved an inflow of sea-water caused by unseaworthiness and no proof that the defect was latent. The maize was damaged by the sea-water, and if the case rested there, the plaintiffs would succeed.

But the defendants say, and it has been proved by the plaintiffs' no less than by defendants' evidence, that, but for the negligence of those on board, the inflow would have been discovered much sooner than it was, and the defendants say it would have been discovered in time to prevent it reaching the cargo at all, for as soon as it was discovered the pumps could have kept it under. At any rate, with proper care in sounding it is quite certain it would have been discovered long before the water rose to nine feet. For so much of the damage as was caused by the inflow of sea-water

(1) [1905] 1 K. B. 697, 706. (2) 12 P. D. 187.

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undiscovered and unchecked by reason of negligence the defendants contend they are protected by the exceptions. Without determining the question whether it was an accident in navigation ejusdem generis with collision and stranding, the inflow of sea-water was clearly a peril of the sea. The words " even when occasioned by negligence, etc.," following a comma, relate in my opinion not merely to " collision, stranding or other accidents arising in the navigation of the steamer " but to all the preceding perils. I am therefore of opinion that, unless the plaintiffs are right in the contention which I will next consider, the defendants would be protected against so much of the damage as was caused by negligence in failing to detect and prevent the inflow.

The plaintiffs however contend that unseaworthiness causing the leak having been proved, the defendants are liable for all the damage which followed. Mr. Stephens at first contended that once there was a breach of the warranty of seaworthiness, the exceptions must be disregarded altogether. That is clearly contrary to authority. *Kish* v. *Taylor, Sons & Co.* (1), approving *The Europa* (2), made that clear, if it was not clear before. It is quite certain that if there be damage by unseaworthiness and damage unconnected with the unseaworthiness but covered by an exceptional peril, the ship is liable only for the damage caused by the unseaworthiness : see Bucknill J. in *The Europa* (2) : " The plaintiffs are only entitled to recover from the defendants such damages as directly resulted from the want of seaworthiness and not for the damage caused by the water which got into the 'tween decks through the collision between the ship and the dock wall, which was covered by the excepted perils in the charterparty, and to the protection of which the shipowner was still entitled, notwithstanding the unseaworthiness of the vessel." Mr. Stephens' next contention came to this—that if damage was initiated by unseaworthiness then no attention could be paid to the excepted perils, and that, whatever supervening causes there might be, the whole damage must be treated as flowing from the unseaworthiness. He said that the recent

(1) [1912] A. C. 604. (2) [1908] P. 84, 98.

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decision of the Court of Appeal in *The Dimitrios Rallias* (1) was authority for this. He further relied on a passage in Carver, sect. 17, and words in a speech by Lord Sumner in *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (2) *The Dimitrios Rallias* (1) is no authority at all for Mr. Stephens' proposition. The exception clause in the contract of affreightment in that case contained the words: "All the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage but any latent defects in hull and/or machinery shall not be considered unseaworthiness provided," etc. The express contract there made a qualified seaworthiness a condition of the application of the exceptions. As soon as it was decided that the ship was unseaworthy, and the defect not latent, there was nothing more to be said. The passage in Carver contains the following words: "If her unfitness becomes a real cause of loss or damage to the cargo, the shipowner is responsible, although other causes from whose effects he is excused, either at common law or by express contract, have contributed to produce the loss." The only colour to Mr. Stephens' argument from this passage is to be got from the word "contributed," but the cases cited to support the passage show what is meant. They are *Lyon* v. *Mells* (3), damage by a leak due to unseaworthiness; *Kopitoff* v. *Wilson* (4), sinking of the ship due to unseaworthiness; *Steel* v. *State Line Steamship Co.* (5), inflow of sea-water by an open port, as to which the question to be decided was whether it made the ship unseaworthy; *The Glenfruin* (6), breaking of a crankshaft due to unseaworthiness. In each of those cases the immediate cause of the damage or loss was a peril of the sea or, in *The Glenfruin* (6), an accident of navigation, but the exception did not protect, because unseaworthiness brought the excepted peril into operation. But Mr. Carver says that the unfitness must be the real cause of the loss or damage. The words Lord Sumner relied on are these: "Underlying the whole

(1) 16 Asp. M. L. C. 62.
(2) [1922] 2 A. C. 250, 260.
(3) (1804) 5 East, 428.
(4) (1876) 1 Q. B. D. 377.
(5) (1877) 3 App. Cas. 72.
(6) (1885) 10 P. D. 103.

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contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case." I do not understand Lord Sumner to be there saying otherwise than this: "If the damage results in consequence of unseaworthiness, an exception which would otherwise be applicable does not protect the shipowner." None of these passages are any authority for saying that you are to treat the exceptions as wholly to be disregarded as soon as unseaworthiness begins to cause damage, or that the exceptions are inapplicable where the causes specified in them operate upon a state of things initiated by unseaworthiness. You still have to find out what "damage results in *consequence* of the unseaworthiness" (Lord Sumner); of what "damage the unseaworthiness is the *real cause*" (Carver). This is just what Lord Atkinson, with the approval of Lord Macnaghten, said in *Kish* v. *Taylor, Sons & Co.* (1) He quoted Lord Blackburn in *Steel* v. *State Line Steamship Co.* (2), and added, "which appears to me to imply that if the damage was not a consequence of this unfitness, the shipowner's liability must be determined by the provision of his contract of affreightment, so far as it dealt with that liability."

I think it is still the law that plaintiffs who assert a breach of the warranty of seaworthiness must prove that the damage was caused thereby, and that while the shipowner cannot rely upon any excepted peril if it was brought into operation by the unseaworthiness of the ship, he can rely upon an excepted peril if it and not the unseaworthiness *caused* the damage, whether the state of things upon which that cause operated was brought into existence by unseaworthiness or not. To test this by reference to the facts of the case I asked myself this question—a defect constituting unseaworthiness sets water flowing into the ship an hour before the time when

(1) [1912] A. C. 604, 617. (2) (1877) 3 App. Cas. 72.

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soundings ought to be taken ; no sounding is taken that day ; had it been taken at the proper time there would have been such a quantity as could at once have been pumped out and thenceforward the inflow kept in check without any damage at all to the cargo ; not being detected, the water flows in till it reaches and damages the cargo. What is the cause of the damage ? I have no doubt the answer is that unseaworthiness is the cause of the inflow of sea-water, but the cause of the damage is the inflow of sea-water occasioned by negligence, that is, by a peril of the sea occasioned by negligence.

The difficulty in the present case is to determine how much of the damage was caused before and how much after the time when, by reason of negligence, the inflow was not detected and countered. The burden is upon the defendants. The maize was in the ship's single hold, which was about 180 ft. long. The total length of the ship was 252 ft. The ship on leaving San Nicolas was 1 ft. 9 in. by the stern, on a draught of 18 ft. 6 in. and 20 ft. 3 in. The rivet hole was somewhat forward of amidships. The size of the hole was seven-eighths of an inch. Calculations were made by the experts on either side as to the amount of water in her to give a sounding of 9 ft., and the time it would take for the amount to flow in, and the amount necessary to fill the bilges. The data were not absolutely fixed. It was not stated whether the sounding of 9 ft. was by the forward or the after sounding pipe ; and it has to be remembered that the ship was under sail and was rolling. Moreover, as she sank the head of water, and therefore the pressure, increased. Whatever the rate of inflow, it is common ground that to get 9 ft. of water in the ship would take much more than twenty-four hours. Mr. Camps for the plaintiffs put it at forty-one hours ; he said 9 ft. of water represented 369 tons, and that the mean inflow would be at the rate of nine tons an hour. Mr. Houston for the defendants said that 9 ft. of water represented 420 tons, and that the inflow would be at the rate of thirteen tons—equalling thirty-two hours. Mr. Camps based his 369 tons on an experiment with maize

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and I accept it, and the plaintiffs cannot complain if I also accept his rate of inflow, which I am inclined to do.

I arrive at the conclusion that the water began to flow in about forty-one hours before 8.50 A.M. on December 20, that is on the afternoon of December 18 (if exactly forty-one hours, at 3.50 P.M.). According to Mr. Camps, to fill the bilges would take eighty-eight tons, that is it would take nine and a half hours before the water was over the ceiling on an even keel. But this must be taken with the qualification that with a ship under sail and rolling, some water would reach the cargo some time before the bilges were full; moreover, owing to the ship being 1 ft. 9 in. by the stern, water from the bilges would reach the cargo aft before the bilges were full throughout.

I can draw no absolutely certain conclusion. The best conclusion I can arrive at is that the water could have flowed in for some five or six hours without reaching any cargo. If it had been discovered within that time, the bilges could have been pumped out and the inflow countered. For the ship's pumps had a capacity of 1000 tons a day, and until there was a substantial amount of water among the cargo, difficulty from maize choking the pumps would not be experienced. When was the sounding last taken before 8.50 A.M. on December 20, and when ought it to have been taken? It is admitted that the logged record of "no water" at noon on the 19th cannot be true. The preceding record is against noon on the 18th. The carpenter was not called. The mate said that he knew the carpenter took soundings on the 18th; he did not say at what hour. As to the 19th he knew nothing. On the 17th he said he took soundings at noon, but the carpenter had taken them in the morning. Before the 17th soundings had been taken every watch; the master's evidence was that that was because the *Christel Vinnen* was a new ship, and that, after a few days of her loaded voyage had shown there was no water being made, he said it was no longer necessary, and soundings could be taken once or twice a day. Neither counsel asked him whether it ought to be twice rather than once. The Elder

Brethren think that in such a ship it would be usual to take them twice a day, morning and evening. But I hesitate to find negligence in not taking them more frequently than once a day. And it is for the defendants to prove negligence. The defendants have not shown that they were not taken as recorded in the log at noon on the 18th. I therefore take it against them that they were. I am prepared to find negligence at noon on the 19th. I am not satisfied as to negligence at any earlier time. From this it follows that the inflow of water from about 4 P.M. on the 18th to noon on the 19th and the damage therefrom was caused by the unseaworthiness. That is about half the time. For the first few hours the water would be only in the bilges, for the next few hours, with the careening and rolling of the ship, it would be lapping over into the cargo, and by the deeper draught aft would get to the cargo aft before the bilges were full. After the bilges were full it would rise in the cargo. In twenty hours there would be about 180 tons in the ship. In the twenty-one hours after noon on the 19th the inflow would be about 189 tons. It would really be rather less before and rather more after noon on the 19th, because of the increasing head of water. One cannot take an exact figure. Moreover, even if one could get an exact figure for the maize actually wetted, it would be impossible to get an exact figure as to the consequential damage to maize not actually wetted.

The best estimate I can make, remembering that the burden of proof is on the defendants, is that half the total damage was caused by the inflow of water due to unseaworthiness and half by the inflow of water due to negligence. I give judgment for 50 per cent. of the plaintiffs' proved loss.

Solicitors for the plaintiffs: *Richards & Butler.*

Solicitors for the defendants: *William A. Crump & Son.*

E. C. M. T.

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DIVORCE.

Distinguished. MAHER *v.* MAHER [1951] P. 342

RUDD *v.* RUDD.

Divorce—Domicil—Change of Domicil of Husband—Effect on Wife—Validity of Foreign Decree to dissolve English Marriage—Failure to give notice of Foreign Proceedings to Party in England—Substituted Service.

Where a husband, domiciled in England, has acquired a new domicil leaving his wife in England, the wife will not be bound here by proceedings for divorce in the courts of her husband's new domicil, of which she has in fact had no knowledge and no notice.

THE parties in this case were married at Withernsea in Yorkshire in October, 1912; they lived together there and in Hull, where the husband was employed in business, until May, 1914. There was no issue of the marriage. On May 30, 1914, the husband left his wife in Hull and went to Canada. He lived there, for the most part at Toronto, until July, 1917. He wrote to his wife at irregular intervals, his last letter being written from Vancouver on July 14. In October, 1917, the wife's solicitors made inquiries and succeeded in obtaining irregular remittances for her from her husband till April 30, 1921, after which date no money was sent and the solicitors' letters were not answered. About the end of January, 1921, the wife heard that her husband was living with another woman at Seattle in Washington State, U.S.A.; and after further inquiries it was found that her husband had on November 23, 1920, obtained a divorce in the Superior Court of the State of Washington for King's County, in which Seattle is situated; and after six months, during which he was by the decree of divorce forbidden to marry, had married again. The American Court required that a copy of the complaint in the action should be posted in a registered letter to the last known address of the wife (this had been done, but it appeared that the address given by the husband was one at which the wife had never lived), and the Court ordered the summons in the action to be served on the defendant wife by publication

thereof for seven consecutive weeks in the Seattle Weekly News. This having been done, and the wife not having appeared within sixty days of the first publication, she was declared to be in default on October 25, 1920, and the decree of divorce was made on November 23.

The wife had in fact no notice or knowledge of the proceedings until it was too late to appear or attempt to set them aside. As soon as she heard of the proceedings she had written a letter asking her husband to return. This letter was given to him personally, but he said he had no intention of ever returning to England.

This petition for restitution of conjugal rights was then filed by the wife, and came on as unopposed on October 16, 1923.

L. R. Lipsett for the petitioner. The petitioner has taken these proceedings merely as a means to get her status established. She desires to have it dismissed if the dismissal can be declared to be made on the ground that the American divorce is binding.

Newton Crane K.C. (examined as an expert on American law) said that the jurisdiction of the Washington State Court was based not on domicil but on residence, but the residence must be bona fide and with an animus manendi.

L. R. Lipsett referred to *Briggs* v. *Briggs* (1); *Mitford* v. *Mitford* (2); and *Bater* v. *Bater*. (3)

[HORRIDGE J. referred to *Casdagli* v. *Casdagli* (4), and said that he was not satisfied that the petitioner had had sufficient notice of the American proceedings, and should take steps to have the case argued, as was done by the President in *Keyes* v. *Keyes and Gray*. (5)]

The case was adjourned and came on again on December 19.

Sir Harold Smith K.C. and *Noel Middleton* appeared for the Attorney-General as amicus curiæ.

(1) (1880) 5 P. D. 163.
(2) [1923] P. 130.
(3) [1906] P. 209.
(4) [1919] A. C. 145.
(5) [1921] P. 204.

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L. R. Lipsett, in continuation of his argument. The husband had acquired an American domicil. There is no suggestion that he did so fraudulently, and, therefore, the rule that the husband's domicil is that of the wife prevails. Domicil gives jurisdiction, and when a foreign court has jurisdiction the English Court will not inquire into its procedure. A foreign judgment in divorce is equivalent to a judgment in rem: *Bater* v. *Bater*. (1)

[HORRIDGE J. The difficulty here is that the wife never had any knowledge of the proceedings. He referred to *Buchanan* v. *Rucker* (2); *Le Mesurier* v. *Le Mesurier* (3); *Pemberton* v. *Hughes* (4); *Shaw* v. *Attorney-General* (5); and *Colliss* v. *Hector*. (6)]

Newton Crane K.C., recalled, said that the Washington decision could be appealed from within three months, and the parties could not marry again for six months, or, if there were an appeal, until the appeal was disposed of. The decree was undoubtedly valid in Washington State, but he doubted whether it would be held valid in all the States.

Sir Harold Smith K.C. and *Noel Middleton*. Domicil is a question of fact, and the burden of proof of any change of domicil is on the party who alleges it: *Hodgson* v. *De Beauchesne* (7); *Winans* v. *Attorney-General*. (8) There is no evidence in this case that the husband had, when he instituted these proceedings, acquired an American domicil, except some vague statement of his after litigation had begun.

If, however, the American Court had jurisdiction by reason of the husband's domicil, the absence of actual notice to the wife would not invalidate the decree. There had been substituted service analogous to that allowed by English Courts.

But even if the husband had acquired a domicil in America,

(1) [1906] P. 209.
(2) (1808) 9 East 192.
(3) [1895] A. C. 517.
(4) [1899] 1 Ch. 781.
(5) (1870) L. R. 2 P. & M. 156.
(6) (1875) L. R. 19 Eq. 334.
(7) (1858) 12 Moo. P. C. 285.
(8) [1904] A. C. 287.

and the decree was valid there, it would not follow that the wife could obtain no relief here. The dicta of Gorell Barnes J. in *Ogden* v. *Ogden* (1), followed in *Stathatos* v. *Stathatos* (2) and *De Montaigu* v. *De Montaigu* (3), show that where a husband has left his wife in the country of her original domicil, when he originally had, or has since acquired, a different domicil, the Court may treat the wife as still domiciled in her own country. In *Armytage* v. *Armytage* (4) the Court applied the same principle by granting judicial separation to a wife resident in England though her husband was domiciled elsewhere.

[They also referred to *Bater* v. *Bater* (5); *Deck* v. *Deck* (6); *Harvey* v. *Farnie* (7); and *Armitage* v. *Attorney-General.* (8)]

HORRIDGE J. This petition is filed by a wife seeking restitution of conjugal rights. A decree of divorce was obtained by the husband on November 23, 1920, in the Superior Court of the State of Washington in the United States of America. This suit is brought for the avowed purpose of testing the validity of that decree. The petitioner would like to have her present petition dismissed, as that would have the effect of determining her status; but I must decide the matter according to law.

The questions to be decided are two: (1.) Did the respondent husband acquire a domicil in the State of Washington which his wife's domicil would follow, and which would thus become the domicil of both? (2.) Did the wife have any sufficient notice of the American proceedings? I am not speaking merely of the technical service upon her. Upon those two questions depends the validity of the American divorce.

On the first point it is clear that both the parties had an English domicil of origin. They were married in England in 1912 and had their domicil here till 1914. The husband,

(1) [1908] P. 46, 82.
(2) [1913] P. 46.
(3) [1913] P. 154.
(4) [1898] P. 178.
(5) [1906] P. 209.
(6) (1860) 2 Sw. & Tr. 90.
(7) (1880) 6 P. D. 35; (1882) 8 App. Cas. 43.
(8) [1906] P. 135.

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then departed from England and went to Canada and later to the United States. The date when he was last heard of is not clear. His wife knew nothing more of him till September, 1921, when she received notice of her having been divorced in America, after the time for appealing against that decree had expired. She was not then in a position to question the decree. In 1922 Sir T. Robinson went out and saw the husband about two years after the date of the decree. The husband then made declarations of his intention of making the United States his permanent home. Can I hold on that evidence that he had changed his domicil before the American proceedings, because on that question depends the validity of the American decree? Domicil of origin can be changed only by the strongest evidence of determination to acquire a fresh one of choice. I think that this is clear from the cases cited to me: *Hodgson* v. *De Beauchesne* (1) and *Winans* v. *Attorney-General.* (2) The onus of proof of a change of domicil is on the party who alleges it. I am not satisfied that the husband ever obtained an American domicil, and, therefore, I hold that the American Court, which pronounced the decree, had no jurisdiction.

Secondly, whether or not the domicil be established, I find that the present petitioner found herself divorced without having had any notice of the proceedings. I must say that such a state of things is repugnant to my mind, even if it is good in law. It was indeed urged in argument that this was a matter inseparable from the question of the jurisdiction of the Court pronouncing the decree, and that it had jurisdiction. Notice, it is said, was immaterial, service having been effected according to the practice of that Court. I believe, however, that there must be a notice of the proceedings to the party to be affected by them before the proceedings can bind that party. I find considerable authority for that proposition; one is *Buchanan* v. *Rucker* (3), where Lord Ellenborough C.J. says

(1) 12 Moo. P. C. 285.

(2) [1904] A. C. 287.

(3) 9 East, 192, 194.

(the case being one where the sufficiency of service upon an Englishman of proceedings in a colonial Court was discussed): "There is no foundation for this motion even upon the terms of the law disclosed in the affidavit. By 'persons absent from the island' (the colony in question) must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the Court; but it can never be applied to a person who for aught appears never was present within or subject to the jurisdiction. Supposing however that the Act had said in terms, that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the Court door; how could that be obligatory upon the subjects of other countries?"

Another authority I find on this point is *Shaw* v. *Attorney-General* (1), where an American divorce was held to be incompetent for want of domicil. And on the question of notice Lord Penzance says: "No case has ever yet decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicil or residence. He has never submitted himself, either directly or inferentially, to the jurisdiction of such a Court, and has never, by any act of his own, laid himself open to be affected by its process, if it never reaches him. A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are ex parte and take place in the absence of the party affected by them."

In *Pemberton* v. *Hughes* (2), where the validity of an American divorce was in question, Lindley M.R., from the initial remarks in his judgment, evidently thought that knowledge by the defendant of the proceedings, having time to enter an appearance, and the opportunity to defend, were material matters to consider in such a case; and Vaughan Williams L.J. says (3): "The true principle seems to me to

(1) L. R. 2 P. & M. 156, 162. (2) [1899] 1 Ch. 781.
(3) [1899] 1 Ch. 796.

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be that a judgment, whether in personam or in rem, of a superior Court having jurisdiction over the person, must be treated as valid till set aside either by the Court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it."

The petitioner in this case had no knowledge of the American proceedings, so on this ground also the American decree cannot stand.

There must be a decree for restitution of conjugal rights, to be obeyed within forty-five days of service, with costs.

Solicitors for petitioner: *H. J. Woodhouse & Co., for G. T. Mainprize, Hull.*

Solicitor for Attorney-General: *The Treasury Solicitor.*

J. R. B.

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Jan. 30, 31; *Feb.* 1, 2, 13.

ADMIRALTY.

THE TUBANTIA.

Shipping—Salvage—Wreck sunk in deep Water—Cargo—Salvors' Possession—Occupation—Interference by rival Salvors—Trespass on High Seas—Injunction—Jurisdiction.

In 1922 the plaintiffs fitted out an expedition to salve cargo from the wreck of a Dutch steamship which had sunk in 1916 in the North Sea in over 100 feet of water. The plaintiffs worked at the scene of the wreck whenever the weather and tides permitted during the summer of 1922 and from April to July, 1923. During that time they had succeeded in cutting a hole into No. 4 hold, had buoyed the wreck, and had extracted some portions of cargo of little value at a cost of over 40,000*l.*

In July, 1923, the defendants, British subjects and partners in a rival salvage company, arrived on the scene in a British registered ship, and, by sending down their own divers and interfering with the plaintiffs' diving operations, tried to secure possession of the wreck and cargo, and either prevent further work on the part of the plaintiffs or establish themselves with the plaintiffs in concurrent occupation:—

Held, (1.) that an action in respect of injurious acts done on the high seas had always been within the jurisdiction of the High Court of

Admiralty; (ii.) that the plaintiffs were sufficiently in occupation of the wreck to exclude third parties from interfering with the property; and (iii.) that as the defendants' interference was high-handed and deliberate they would be restrained until further order from doing any acts at or near the wreck whereby the plaintiffs might be prevented or hindered in the carrying on of their salvage operations.

ACTION for damages for trespass and/or for wrongful interference with the plaintiffs' salvage services on and attendant at the wreck of the steamship *Tubantia* and/or her cargo.

According to the statement of claim, in January, 1916, the Dutch steamship *Tubantia* sank in the North Sea in over 100 feet of water after being torpedoed by a German warship. No attempt was made by any one to salve the ship or cargo until the beginning of 1922, when the plaintiffs, Major Sippe, D.S.O., and others, determined to fit out an expedition in order to raise the vessel or recover anything of value in her. They accordingly engaged steamers and tugs and employed divers and salvage experts. In April, 1922, the plaintiffs started sweeping operations and sent divers down and eventually located the *Tubantia*, but owing to her broken condition found there was no possibility of raising her. Throughout the summer of 1922 the plaintiffs continued diving operations whenever the weather conditions permitted until the month of November, when it became impracticable to continue working through the winter. The plaintiffs then buoyed the *Tubantia* so as to indicate her position and left her until April, 1923, when the operations were resumed.

On July 9, 1923, the defendants, Vincent Grech and Count Zanardi Landi, British subjects and partners (together with one Cecil Reed, who was added as a defendant in the course of the hearing (1)) in a company called the British Semper Paratus Salvage Company, proceeded with their steamship *Semper Paratus* to the place of the wreck and anchored her in close proximity to the plaintiffs' salvage steamer, thereby

(1) NOTE.—The Ayeready Salvage and Towage Company, who were also named as defendants in the writ, satisfied the plaintiffs that they had nothing to do with the operations of the other defendants, and the plaintiffs did not pursue their claim against this company.

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interfering with the plaintiffs' operations. Though requested to leave, the defendants remained with the *Semper Paratus* at or near the wreck until after the issue of the writ in the present action on July 16, 1923. On July 13, when in close proximity to the wreck, the defendants got their sounding lines entangled in the plaintiffs' lines. On the same day the defendants tried to moor a motor launch to one of the plaintiffs' buoys and to raise the plaintiffs' grappling irons and anchor; and on several occasions they sent down divers on to or in close proximity to the wreck.

The plaintiffs alleged that the defendants intentionally and without justification or excuse interfered with the plaintiffs' possession of, and their salvage operations on, the *Tubantia* and her cargo; that the ultimate success of the operations was imperilled; and that the plaintiffs, who had spent approximately 40,000*l.* up to the beginning of the proceedings in the action, had thereby suffered damage.

The plaintiffs claimed (*a*) a declaration that they were entitled to possession of the *Tubantia* and her cargo; (*b*) damages; (*c*) an injunction restraining the defendants from proceeding to, remaining at, or interfering with, the *Tubantia* and/or her cargo (1); (*d*) a reference to the registrar and merchants to assess the amount of damage.

The defendants denied the plaintiffs' possessory rights and the alleged infringement of them; and the defendant Count Landi further denied that the plaintiffs had the ability, appliances, or competency to save any of the property, or to do so without aid. He alleged that he was ready and willing to co-operate with the plaintiffs for the purpose of saving any property capable of being saved, and to bring into Court anything he might succeed in recovering from the wreck.

Sir John Simon K.C., *Harold Stranger* and *C. A. Hooper* for the plaintiffs. The defendants have committed a tort

(1) NOTE.—On July 31, 1923, the plaintiffs moved the Court for an interim injunction against the defendants until the trial of the action. Hill J. refused the application, but warned the defendants that the Court would view with disfavour any interference by them with the plaintiffs' operations: [1923] W. N. 256.

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on the high seas. There was actual physical interference with the wreck and the plaintiffs' operations, and the Admiralty Court has jurisdiction to grant relief. It is stated in Blackstone's Commentaries, iii., 106 : " Injuries cognizable by the courts maritime. . . . . The statute 15 Rich. II., c. 3, declares that the Court of the Admiral hath no manner of cognizance . . . . of any wreck of the sea : for that must be cast on land before it becomes a wreck. But it is otherwise of things *flotsam*, *jetsam*, and *ligan*, for over them the Admiral hath jurisdiction, as they are in and upon the sea." See also Comyn's Digest, Tit. " Admiralty " (E. 7). The wreck of the *Tubantia* and her cargo are in the nature of ligan—namely, something at the bottom of the sea to which a line is attached. " Lagan (vel potius ligan) is when the goods which are so cast into the sea are so heavy that they sink to the bottom and the mariners, to the intent to have them again, tie to them a buoy " : *Constable's Case.* (1) The Court of the Admiral has always had jurisdiction over wrongs of a maritime nature committed on the high seas : see *The Ruckers* (2) ; *The Hercules* (3) ; and the Admiralty Court Acts have in no way restricted that jurisdiction : cf. *The Zeta.* (4) Subject to the question of service of the writ, the High Court of Justice has jurisdiction over torts even when committed abroad. In this case, as the defendants are British subjects and the *Semper Paratus* is registered as a British ship, there is no difficulty in service or in enforcing the orders of the Court.

On the facts the plaintiffs were in possession of the res. The act which will constitute possession depends on the circumstances of each case. " By possession is meant possession of that character of which the thing is capable " : per Lord FitzGerald in *Lord Advocate* v. *Young.* (5) The remains of the *Tubantia* was a res derelicta ; it had been abandoned by its owners : see, as to abandonment in law, *Brown* v. *Mallett* (6) ; *White* v. *Crisp* (7) ; *The Crystal* (8); and *Barraclough*

(1) (1601) 5 Rep. 106a.
(2) (1801) 4 C. Rob. 73.
(3) (1819) 2 Dods. 353, 368.
(4) [1893] A. C. 468.
(5) (1887) 12 App. Cas. 544, 556.
(6) (1848) 5 C. B. 599, 617.
(7) (1854) 10 Ex. 312, 322.
(8) [1894] A. C. 508.

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v. *Brown*. (1) The person who first obtains possession of a res nullius becomes owner: *Bridges* v. *Hawkesworth* (2); see also *The Winkfield* (3), as to the rights of a bailee in possession, and, as to acquiring possession, Pollock and Wright's Possession in the Common Law, pp. 28 et seq. and 124. For the position in Roman law see Digest, XLI., Tit. 2 and Tit. 7. By attaching lines to the wreck and fastening them with buoys the wreck was reduced into possession just as a whale is reduced into possession by harpooning it: *Hogarth* v. *Jackson* (4), "trover for a whale"; *Skinner* v. *Chapman* (5); and cf. *Young* v. *Hichens* (6), where the capture of fish partly encircled in a net was held to be incomplete. See also *Keeble* v. *Hickeringill* (7), frightening duck from a decoy in the lawful possession of the plaintiff; *Carrington* v. *Taylor* (8) is to the same effect; see also *Ibottson* v. *Peat* (9) and *Jones* v. *Chapman*. (10) All these cases show that a limited possession or occupation is good as against third parties.

In salvage actions the Court always regards with disfavour second salvors who try to oust or without justification associate themselves with the original salvors: see *The Charlotta* (11); *The Eugene*. (12) The plaintiffs have been pursuing a lawful maritime adventure, and the defendants have wilfully interfered with them and have imperilled the lives of their divers. Damages alone are an insufficient remedy; unless the defendants are restrained by means of an injunction they will continue their operations.

Dunlop K.C. and *Spens* for Count Landi. The main question is whether the plaintiffs had acquired by July, 1923, a legal right to go on searching for possible treasure, with a bare possibility of success, to the exclusion of the whole world. On the facts the plaintiffs have not got possession of

(1) (1897) 8 Asp. M. L. C. 290; [1897] A. C. 615.
(2) (1851) 21 L. J. (Q. B.) 75.
(3) [1902] P. 42.
(4) (1827) Moo. & Mal. 58.
(5) Ibid. 59*n*.
(6) (1844) 6 Q. B. 606.
(7) (1706) 11 East, 574*n*., from Holt C.J.'s MS.
(8) (1809) 11 East, 571.
(9) (1865) 3 H. & C. 644.
(10) (1847) 2 Ex. 803.
(11) (1831) 2 Hagg. Adm. 361.
(12) (1834) 3 Hagg. Adm. 156.

the res, and without possession they cannot bring an action based on nuisance or trespass: see as to nuisance Pollock's Law of Torts, 12th ed., ch. x. They claim to appropriate the wreck to their own use. But treasure trove found on the high seas belongs to the Crown: *The Aquila* (1); *Rex* v. *Property Derelict* (2); *H.M.S. Thetis* (3); and that principle has been embodied in the Merchant Shipping Acts: see ss. 518–523 of the Act of 1894 and s. 72 of the Act of 1906. The wreck, however, is not res nullius; the owners are still entitled to claim their property: see, as to bona vacantia, Pollock and Wright's Possession in the Common Law, p. 124. The first salvor cannot maintain an action of trespass and claim an injunction to prevent second salvors from ousting him. No instance of such an action can be found. "It would be carrying the doctrine (of possession) further than I have seen it done, were I to hold that when the services are necessarily intermittent, it is not competent to other persons in the interim to come in and act as salvors": per Dr. Phillimore in *The Clarisse*. (4) The danger to which property lost at sea is exposed is an invitation to all the world to do what is necessary to preserve the property, and the only case in which the interference of second salvors is not justified is when the property is in no danger and safely in the custody of the first salvor. A salvor has not got exclusive possession, he is merely licensed by the danger to which the property is exposed temporarily to take charge of it, and a licensee cannot maintain an action of trespass: cf. *Duke of Newcastle* v. *Clark*. (5) The second salvor does not commit trespass, he derives his authority from the implied consent of the owners. The plaintiffs are forced to rely on actual physical possession. But the wreck is practically in three parts, silted up with sand and, as the plaintiffs admit, immovable. At most the plaintiffs have had a brief, precarious and intermittent occupation through their divers for the purpose of seeking for something of value. That does

(1) (1798) 1 C. Rob. 37, 42.
(2) (1825) 1 Hagg. Adm. 383.
(3) (1835) 3 Hagg. Adm. 228.
(4) (1856) Swa. 129, 132.
(5) (1818) 8 Taunt. 602.

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not constitute possession. The plaintiffs' claim in substance is for the exclusive right of visit and search, a right which is not recognizable in law. The mere aggravation of an act will not make it a trespass if without the aggravation it would not be a trespass: *British South Africa Co.* v. *Companhia de Moçambique* (1), where it was also held that the Supreme Court has no jurisdiction to entertain an action for trespass to land situate abroad. Similarly it is submitted the Court has no jurisdiction to grant an injunction in respect of trespass on the high sea. No case can be found in which the High Court of Admiralty ever issued a monition under such circumstances. Even if the Court has jurisdiction to grant an injunction it should not do so in the present case, as it would affect the rights of third parties. If the plaintiffs discontinue their operations, are the defendants still to be debarred from endeavouring to salve the cargo? As regards the claim for damages there is no evidence that the plaintiffs have sustained any actual damage at all.

[*Newman* v. *Walters* (2) and *The Elton* (3) were also referred to.]

Alfred Bucknill for the defendant Grech. If Count Landi, who was on board the *Semper Paratus* and directing the operations, was guilty of the wilful interference alleged by the plaintiffs, this defendant is not liable. The shipowner is not responsible for damage wilfully committed by the master: *The Druid.* (4) Although a partner with Count Landi, this defendant did not adopt the alleged wrongful acts, he had no control over them, and they were not within the ordinary course of the business of the firm within the meaning of s. 10 of the Partnership Act, 1890.

Sir John Simon K.C. in reply. In the case of a derelict vessel salvors have exclusive possession: *Cossman* v. *West* (5); and salvors in possession have a legal interest which cannot be divested without adjudication in a competent Court: *The Blenden-Hall* (6); see also Kennedy's

(1) [1893] A. C. 602, 629.
(2) (1804) 3 Bos. & P. 612.
(3) [1891] P. 265.
(4) (1842) 1 W. Rob. 391.
(5) (1887) 13 App. Cas. 160, 181.
(6) (1814) 1 Dods. 414.

Civil Salvage, 2nd ed., p. 9. The plaintiffs do not base their case on ownership.

As regards the defendant Grech, he is responsible for the mode in which his partner carried out an enterprise which was clearly done in the course of the firm's business: cf. *Limpus* v. *London General Omnibus Co.* (1)

Cur. adv. vult.

Feb. 13. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: The plaintiffs in this action—a British subject and four citizens of the French Republic—bring their action in respect of alleged wrongful acts of the defendants upon the high seas. The place in question is a point in the North Sea some fifty miles from our shores, and from twenty to twenty-seven miles from the coasts of France, Belgium and Holland, where, at a depth of nineteen or twenty fathoms, lies so much as is now in being of the hull and cargo of a Dutch steamer, the *Tubantia*, which was a vessel 541 feet long and of 15,000 tons register. Alleged rights over the *Tubantia* and her cargo are the real subject matter of the controversy. The vessel was, as the parties say, sunk at the place in question in January, 1916, by a German warship. The plaintiffs assert possessory rights over the wreck and its contents and complain of trespasses thereon and also of wrongful interference by the defendants and their servants with the lawful business of the plaintiffs. They claim a declaration to establish the possessory rights which they allege, an injunction to restrain interference by the defendants with their possession of or operations upon the *Tubantia*, and damages to be assessed by the registrar and merchants according to the practice of this Division.

The defendants against whom the action has proceeded are Cecil Finlay Reed, Vincent Grech and C. Zanardi Landi, who constituted, as appears, the partnership called in the pleadings the Semper Paratus Salvage Company and under that name added to the defendants in the cause. The steamship *Semper Paratus* was used by the defendants, as is alleged, in doing

(1) (1862) 1 H. & C. 526.

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the acts complained of by the plaintiffs. She is of British register. The defendants deny the alleged possessory rights of the plaintiffs, and the alleged trespasses and molestations. The defendant Landi raises alternative defences which treat the plaintiffs as would-be salvors of the *Tubantia* who were unable to effect their salvage undertaking and assert that the defendants were ready and willing to co-operate with the plaintiffs as salvors and to bring into Court any salved property. There was evidence at the hearing of a serious belief among the parties that the wreck of the *Tubantia* contains treasure of large value. A salvage agreement into which the three defendants entered for the purposes of their joint undertaking specifies a sum in gold of the German pre-war currency worth not less than two million pounds sterling.

The particulars I have stated show the controversy between the parties to be of an unusual kind, and the plaintiffs are invoking in respect of it powers of the Court derived from the Judicature Acts which rarely come in question here. On the defendants' part one short answer which was made to the claims of the plaintiffs was that they are without precedent. The absence of specific authority no doubt necessitates caution in the consideration of the case. What is really to be decided, however, is whether in respect of the *Tubantia* and her cargo any rights of the plaintiffs have been infringed by the defendants and, if so, what are the appropriate remedies.

To some subjects of great juristic interest which were debated I shall refer only in passing. That the Court has jurisdiction over the matters in question I cannot doubt. A suit in respect of injurious acts done upon the high seas was within the undisputed jurisdiction of the Court of Admiralty, as appears upon reference to Comyn's Digest (Comyn's Digest, Tit. "Admiralty" (E. 7), and to Blackstone's Commentaries, iii., 106. This Division now has the jurisdiction and powers defined, and in some cases conferred, by the Judicature Acts. The property in a legal sense which is the subject of the activities of the parties is not for adjudication at this time. Whether the *Tubantia* and her cargo are things

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derelict in the sense in which the term res derelicta was used in Roman law I have not to decide. Nor need I come to any conclusion as to the limits which international right may impose upon any claim under the prerogative of the British Crown to bona vacantia lying on the ocean floor in the North Sea. Sir John Nicholl explains in *H.M.S. Thetis* (1) how property may be derelict on the seas without being a droit of Admiralty. The derelict in question there was treasure in silver bullion of the amount of 157,000*l.* recovered from deep water on the coast of South America, and as soon as it was proceeded against by the Admiralty on behalf of the Crown the owners appeared and their claim was admitted, but subject to the rights of the salvors who had reduced it into their possession under orders of British naval authorities. So far as the matter may be thought material I need only say there is here no proof or presumption sufficient to convince me that the owners of the wreck or the cargo in question have lost whatever rights they originally had. Without the intention to abandon they would not have done so under Roman law (Digest, XLI., 7, 1 (2); XLVII., 2, 43, §§ 10, 11; Inst., II., 1, §§ 47, 48). Nor, so far as I am aware, would the ancient rule "Res nullius fit occupantis" be held to give property in the things in question in the Courts of any State bordering on the North Sea. Some lengths of silk were produced before me. If they had been of value, and if property came in question, I must have seen that the Procurator-General had notice of the matter, and that lawful claimants were given an opportunity to appear. The things in question here are, as I find, derelict in the limited sense in which that term is constantly used here in cases of salvage—what Lord Stowell called "the legal sense": *The Aquila.* (3) They are not in the possession or control of any owner or person acting on behalf of an owner. The possession of a salvor in a ship or cargo, or wreck derelict in this sense is, however, as well

(1) 3 Hagg. Adm. 228.

(2) "Isdem modis res desinunt esse nostrae quibus adquiruntur" (Ulpian).

(3) 1 C. Rob. 37.

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known to the law as any other right of a salvor. It has often been asserted, and, indeed, vindicated in the Admiralty jurisdiction. The plaintiffs are, therefore, entitled to a decision as to whether they had in July, 1923, as they assert they had, possession by their agents of the wreck of the *Tubantia* and the cargo therein.

The facts on which the plaintiffs rely in support of their claim that they had possession in July, 1923, are fully set forth in the statement of claim, and, in all material particulars, were proved at the hearing. Their operations began in April, 1922, and for a long time were discontinuous. Their controversy with the defendants arose in July, 1923. They then had, and from that time to the hearing they have kept, craft and divers at the place in question. What had been done, and what was going on in July, 1923, are matters in dispute, and must be stated in some detail. The plaintiffs, by employing during two seasons various vessels suitable for salvage work with competent crews, ascertained and marked out the area occupied by the *Tubantia*, and by means of buoys properly moored they were able to, and did, keep in position, at and above the wreck, craft from which work could be carried on upon the hull and in the holds. They established and in July, 1923, were using, various buoyed moorings by which they had direct access to the deck at various points. They cut out a hole in the ship's side fourteen feet by ten, which gave them access to No. 4 hold, in which a great bulk of cargo appears to have been stowed, and by means of tackle fixed at the side of the hold their divers had a way of approach to and entry upon that hold. The various appliances to which I have referred were of the nature of fixed plant on and around the *Tubantia*, such that when the weather and the state of the tide permitted, divers could by its use work in and upon the wreck and among the cargo. Two pairs of divers were so at work during May, June, and July, 1923. They explored the wreck, removed obstructions, opened the approaches to and worked upon the cargo, and brought up parts of the structure and of the cargo. The possible working hours in each day, however, did not exceed

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two spells of one and three-quarter hours at a time, of which 45 minutes at a time were spent in the holds. The number of working days in 1923 seems not to have exceeded twenty-five, and the working plant was liable to be carried away or destroyed by the sea. Some of it sometimes was. The appliances I have mentioned, and the frequently interrupted access to the wreck which the plaintiffs had in the summer of 1923, are the evidences of possession at the dates in question in this case on which the plaintiffs rely.

On the question whether in the state of facts I have described the plaintiffs could be found to have had possession of the *Tubantia* when the defendants appeared on the scene, counsel on both sides cited largely from Sir Frederick Pollock's well-known treatise on possession: Pollock and Wright, Possession in the Common Law. The questions suggested in this way I have sought to apply. They involve inquiries such as these: what are the kinds of physical control and use of which the things in question were practically capable? Could physical control be applied to the res as a whole? Was there a complete taking? Had the plaintiffs occupation sufficient for practical purposes to exclude strangers from interfering with the property? Was there the animus possidendi? I have also taken this to be a true proposition in English law: A thing taken by a person of his own motion and for himself, and subject in his hands, or under his control, to the uses of which it is capable, is in that person's possession. "Omnia ut dominum gessisse" is, Sir Frederick Pollock says, a good working synonym for "in possessione esse," and I cannot doubt that if the owners of the *Tubantia* in 1916 had put themselves, in 1923, in the position in which the plaintiffs put themselves they would be held to have been in actual possession. It would not be safe, though, to rely on this, for there is a presumption in law which aids the operative effect of the possessory acts of an owner. To illustrate my meaning, I am told that the Trinity House commonly holds possession of the wreck of a ship by mooring upon it a single buoy. I had the advantage of the assistance of the Elder Brethren at the hearing, and I have consulted

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them as to the practical aspects of the matters in question. They advise me that by reason of the great depth at which the wreck lies the difficulties involved in the work of the plaintiffs are formidable, but that, if I accept the plaintiffs' evidence, they were in effective control of the wreck as a whole; that they were in a position to prevent any useful work by new-comers; and that, while the plaintiffs' people remained in the position they claimed to have taken up, no new-comer could, without violence, have exercised upon the wreck the kind of control the plaintiffs had, or could have made any valuable use of the wreck. They advise me that what the plaintiffs did upon the wreck was what a prudent owner would probably have done, assuming he did not know how the holds of the *Tubantia* were stowed and desired to inform himself fully as to the situation on the wreck before employing larger craft or more powerful appliances than the plaintiffs were employing. These opinions entirely commend themselves to my judgment, and I have come to certain conclusions which I will now state.

There was animus possidendi in the plaintiffs. There was the use and occupation of which the subject matter was capable. There was power to exclude strangers from interfering if the plaintiffs did not use unlawful force. The plaintiffs did with the wreck what a purchaser would prudently have done. Unwieldy as the wreck was, they were dealing with it as a whole. The fact on the other side which is outstanding is the difficulty of possessing things which lie in very deep water and can only be entered upon by workmen in fine weather and for short periods of time. Must it be said that, because the work of the plaintiffs' divers was that of only one pair at a time, in short spells with long interruptions, and because access to the holds of the *Tubantia* was often prevented altogether by stress of weather, therefore the vessel, and her cargo, were incapable of possession? To my mind this would be an unfortunate conclusion, very discouraging to salvage enterprise at a time when salvage, by means of bold and costly work, is of great public importance. I do not feel bound to come to it. I hold that the plaintiffs

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had in July, 1923, the possession of the *Tubantia* and her cargo, which they allege.

Did the defendants then trespass upon the possession of the plaintiffs? The acts which are complained of occurred during some eight days in July. They are described in very moderate terms in the statement of claim. The defendants came upon the scene with their vessel, the *Semper Paratus*, a powerful and well-equipped ship, together with a motor launch equipped for dredging. They came to find the *Tubantia* and take possession. The defendant Landi, who was in charge, recognized when he arrived that the defendants had been forestalled, but deemed himself entitled to thrust in upon the plaintiffs, and if not to prevent further work by them, to establish himself with them in concurrent occupation. Seeing how the plaintiffs had laid out the ground, and the method of their work, the defendants' party dredged with loaded lines and grapnels to find the hull and the plaintiffs' moorings. They searched with dragging appliances among and about the buoys and moorings and working places of the plaintiffs, and carried on the process so thoroughly that the experienced divers whom the plaintiffs employed became justifiably alarmed and altered their mode of working after they descended. Instead of attaching their line and pipe at the entrance to the ship's hold, as they had previously done, and working together upon the cargo in the hold, one of them attended upon the line and pipe, while the other worked in the hold. I say nothing in detail of the action of the defendants' representatives in mooring the *Semper Paratus* across the tide ahead of the wreck in a position which threatened the safety of the plaintiffs' ship and people. Besides doing the acts I have mentioned the defendants fouled the plaintiffs' moorings; they took a mooring upon the wreck, and they sent down a diver who entered upon the wreck. These acts were done with the intention of hampering the plaintiffs and depriving them of any advantage they had gained by their work upon and possession of the wreck, and of securing possession for the defendants. Some of the things complained of were trespasses to goods; all were intentional

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interferences with and molestation of the plaintiffs' workmen in their work.

The contention raised by the defendant Landi that in the circumstances of the plaintiffs' salvage undertaking, the defendants were entitled as would-be salvors to do what was in fact done under this defendant's direction, raises a question to which I ought to refer. It is based upon assertions that the plaintiffs were not in possession, and that they either were not able to effect salvage, or would be better able to effect it with the defendants' help. Mr. Dunlop contended for the right on the part of any number of persons who may desire to join in a salvage undertaking which is in progress to participate upon even terms with all other salvors, and salvage is no doubt an undertaking in which many parties often concur. That the plaintiffs were in possession is, however, the governing factor in the present case. The principle of law which applies under such circumstances is that stated in the judgment of Lord Stowell in *The Blenden-Hall* (1), and also in the judgment of the Privy Council in *Cassman* v. *West.* (2) Lord Stowell in *The Blenden-Hall* (1) laid down that those who have obtained possession of a ship as salvors have the legal interest which cannot be divested before adjudication takes place in a Court of competent authority. The Privy Council in *Cassman* v. *West* (2) held that: "In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence." There was no manifest incompetence on the part of the plaintiffs and their servants. The Elder Brethren advise me that the work done appears to them to have been done efficiently and well, well directed and so planned as to secure the best practicable results in salvage. The special defence of the defendant Landi fails, and I must add that if the plaintiffs had only begun the salvage undertaking and had had no possession, and if the salvors might lawfully have

(1) 1 Dods. 414, 416. (2) 13 App. Cas. 160, 181.

joined in the enterprise, what was in fact done by the defendants' representatives would still seem to me unjustifiable.

What follows from the findings I have stated is that the defendants personally, or by their servants or agents, have trespassed upon the plaintiffs' possession and wilfully and wrongfully interrupted and molested them in their lawful undertaking. Molestation such as that of which the plaintiffs complain is, in my opinion, actionable where it causes damage. The decisions in cases like *Hogarth* v. *Jackson* (1) and *Young* v. *Hichens* (2) on the one hand, and *Keble* v. *Hickeringill* (3) and *Carrington* v. *Taylor* (4) on the other, were cited in the argument upon this part of the case. It is worth while perhaps to refer also to dicta of the learned judges in *Young* v. *Hichens* (2), and of other judges in *Skinner* v. *Chapman* (5), as to the question whether in a properly framed action damages may be recoverable for wilful prevention of the completion of an enterprise capable of producing profit. I know no reason for supposing it to be other than wrongful to obstruct a salvor in the course of his enterprise so as to prevent his carrying it on, even if the obstruction is practised by one who is entitled himself to be a salvor.

Upon leave granted provisionally in the course of the hearing the plaintiffs added words to their statement of claim which somewhat elaborated their allegation in respect of molestation. Thereupon amended defences were delivered, and on behalf of one defendant it was contended that if wrongs were committed, they were personal torts of the defendant Landi, in respect of which no liability could attach to his partners. I am inclined to think the amendment does not introduce any new cause of action, but this is not material. The whole matter had been raised and tried out before I suggested it. As to the acts in question, they were, as I find, done in the course of the enterprise of which the defendants entrusted the management to Count Landi, to the utmost of his power,

(1) Moo. & Mal. 58.
(2) 6 Q. B. 606.
(3) 11 East, 574*n*.
(4) 11 East, 571.
(5) Moo. & Mal. 59*n*.

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and in assertion of the supposed right of the defendants, and so, for the purposes of their enterprise. The defendants therefore are collectively liable to the plaintiffs.

As to the relief claimed by the plaintiffs I have felt some difficulty. A possessory right is of a limited and perhaps transitory kind, and I am not minded to make a declaration which might be misconstrued as evidence of some other than a possessory right. An injunction is properly claimed when there is the threat or danger of repetition of the wrongs complained of, especially when they affect material interests, though it is to be strictly limited so as not to enlarge the rights of the one party or to infringe the rights of the other. The defendants' interference with the plaintiffs, moreover, was high-handed and deliberate, and, unless restrained, they may repeat it. I propose, therefore, to restrain the defendants, their servants and agents, until further order of the Court from doing any acts at or near the wreck of the *Tubantia* whereby the plaintiffs may be prevented from or hindered in carrying on salvage operations thereon. My judgment to this effect must be with costs against the defendants. There is a claim for damages and some evidence of damage in loss of time of divers. If the plaintiffs desire a reference they must have it, reserving the question of costs. (1)

Solicitors for the plaintiffs: *J. D. Langton & Passmore.*

Solicitors for the defendant Count Landi: *Wm. A. Crump & Son.*

Solicitors for the defendant Vincent Grech: *Botterell & Roche.*

(1) NOTE.—The decree, omitting formal parts, (1.) declared against the defendants that the plaintiffs were in July, 1923, entitled (without prejudice to the rights, if any, of the Crown or of parties other than the plaintiffs and defendants) to possession of the *Tubantia* and her cargo; (2.) granted an injunction against the defendants until further order of Court restraining them from doing any act at or near the wreck and cargo of the *Tubantia*, whereby the plaintiffs might be prevented from or hindered in carrying on salvage operations thereon or in connection therewith; (3.) condemned the defendants jointly and severally in the costs of the action; and (4.) ordered a reference to the registrar and merchants to assess the damages.

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Shipping—Bill of Lading—Demurrage—Steamer "entitled to commence discharging immediately after arrival . . . ."—"Goods shall be taken from the ship's tackle . . . . directly on their coming to hand. . . . ."—Master's Certificate to be conclusive as to extent of Delay—Delay due to unavoidable Causes—Validity of Certificate.

Parcels of timber consigned to the defendants were carried on board the plaintiffs' ship under bills of lading containing the following clause: "Steamer shall be entitled to commence discharging immediately after arrival . . . . either into lighters or other craft or at the quay . . . . and discharge continuously, day and night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master. . . . . The goods shall be taken from the ship's tackle by the consignee of goods directly on their coming to hand. . . . . If consignees fail to receive as above stated, and no facilities are available for discharging into craft or on wharf without delay to steamer, receivers shall pay . . . . demurrage [at a fixed rate]. The master's certificate shall be conclusive and binding both as to the extent of the delay . . . . and the amount payable by consignees hereunder in respect of such delay. . . . ."

On arrival at the port of discharge no deep water berth was available, and, owing to the dimensions of the timber, discharge into lighters was impossible. The discharge accordingly was effected by delivery of the timber overside into the water, where it was received by the defendants' agents, formed into rafts, and removed. No delay avoidable by the defendants occurred in the discharge.

The master certified that 2792*l.* was due from the defendants in respect of six days' demurrage, and in the certificate attributed the delay to there being no vacant berth alongside the quay and no lighters available:—

Held, (i.) that the words "steamer shall be entitled to commence discharging," etc., merely conferred a right, power or liberty upon the shipowners and did not imply an undertaking by the consignees that facilities would be available for the exercise of the right.

(ii.) That the goods were "taken from the ship's tackle directly on their coming to hand" in the business sense of those words.

(iii.) That the delay assessed by the master was not delay which he was empowered by the bills of lading to certify for demurrage, and that accordingly the certificate was not binding.

THE plaintiffs, the United States of America represented by the United States Shipping Board, were the owners of the steamship *Coahoma County*. The defendants, the Falmouth Docks and Engineering Co., were the indorsees and

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receivers of a cargo of pitch-pine timber and lumber under three bills of lading containing the following clause :—

" 8. Also, that the steamer shall be entitled to commence discharging immediately after arrival (without reference to the state of the weather), either into lighters or other craft or at the quay, or at more than one berth, and discharge continuously, day and night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master, any custom of the port to the contrary notwithstanding. The goods shall be taken from the ship's tackle by the consignee of goods directly on their coming to hand in discharge of the ship ; otherwise the master or ship's agent shall be at liberty to enter and land the goods. . . . . If consignees fail to receive as above stated, and no facilities are available for discharging into craft or on wharf without delay to steamer, receivers shall pay the steamer demurrage for such detention at the rate of 50 cents per net registered ton per day of twenty-four hours for each day or part of day during which the goods shall not be received as above stated. The master's certificate shall be conclusive and binding both as to the extent of the delay in the receipt of the cargo and the amount payable by consignees hereunder in respect of such delay. . . . . "

The plaintiffs alleged that the *Coahoma County* arrived at Falmouth to discharge on September 6, 1921, but the defendants failed to provide a berth or lighters, and no facilities were available for discharging into craft or on wharf. At the request of the defendants the cargo was discharged over side into the sea by means of the ship's tackle, and by reason thereof six days were occupied beyond the time within which the cargo would have been discharged if craft or a berth had been available. On September 20, 1921, the master of the *Coahoma County* signed a certificate stating that demurrage at the rate of 50 cents per net registered ton per day was payable by the receivers and certified the amount at 2792*l.* 3*s.* 7*d.* The plaintiffs claimed this sum and/or damages.

The defendants alleged that they took delivery of the cargo

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from the ship's tackle as soon as it came to hand, and that if there was any delay (which they denied) it was attributable to the breakdown of the starboard winch to No. 1 hold, and to the negligence of the plaintiffs in overstowing the Falmouth cargo with cargo for another port, and stowing the Falmouth cargo over a consignment of wheat, which necessitated the constant replacement of the hatches and interruption in discharge to avoid rain damage to the wheat.

C. R. Dunlop K.C. and *Langton* for the plaintiffs. Under cl. 8 of the bill of lading the receivers were absolutely bound to provide facilities for discharge as soon as the ship arrived, and if they did not take delivery at the full capacity of the ship's tackle they are liable for the delay. It appears that on three separate days the raftsmen decided that the sea was too rough for them to take delivery, but there was still ability on the ship's tackle to give delivery. The master's certificate is binding, certainly if there was any delay at all. But, even if the certificate be open to review, there was in fact delay in respect of which the plaintiffs are entitled to demurrage.

Raeburn K.C. and *G. St. C. Pilcher* for the defendants. The highest possible construction of cl. 8 as against the receivers is that thereunder they must take as fast as the steamer can deliver in all the circumstances: see *Hulthen* v. *Stewart & Co.* (1) The receivers are not in the position of charterers; there was no obligation on the receivers until the master could give delivery at the ship's rail. There was no obligation on them to provide a berth or lighters: c.f. *The Lizzie* (2), and all that cl. 8 means is that the receivers cannot object to take discharge at the quay or into lighters. Such phrases as "as fast as the master can require" mean "as fast as the vessel can deliver having regard to the circumstances of the port": see *Sea Steamship Co.* v. *Price, Walker & Co.* (3) Delivery could not have taken place during the bad

(1) [1903] A. C. 389. *Van Liewen* v. *Hollis Brothers & Co.*
(2) [1919] P. 22, and, sub nom. [1920] A. C. 239.
(3) (1903) 8 Com. Cas. 292.

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weather: c.f. *Thiis* v. *Byers* (1), where the facts were very similar to those in the present case; and there was no delay avoidable by the defendants. They in fact took delivery directly the timber came to hand from the ship's tackle.

The master's certificate is not one which the clause contemplates. The master applied wrong principles and took a mistaken view of the delay in respect of which he could certify. If in fact there was no delay for which the defendants are liable he cannot certify that there was. He cannot be put in a higher position than that of an arbitrator, and the certificate being bad on the face of it is not binding.

Dunlop K.C. in reply. None of the cases cited on behalf of the defendants have any application as regards the effect of cl. 8, which is quite clear and unambiguous. It cannot mean that the ship is entitled to certain facilities, but that there is no obligation on receivers to provide them. The master in giving a certificate is not in the position of an arbitrator; his position is akin to that of an architect in certifying for work done under a builder's contract: see *Wadsworth* v. *Smith* (2), and in the absence of fraud the certificate is final: *Sharpe* v. *San Paulo Ry. Co.* (3)

Cur. adv. vult.

Feb. 4. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: This action is brought by the United States Shipping Board as owners of the steamship *Coahoma County* to recover from the defendants, the Falmouth Docks and Engineering Co., 2792*l.*, which the plaintiffs allege to be due to them for demurrage on an assessment of demurrage by the ship's master pursuant to the terms of bills of lading, and alternatively, for damages under three bills of lading issued by the plaintiffs' master and accepted by the defendants in respect of the carriage by sea of three consignments of timber and lumber from Mobile, U.S.A., to Falmouth.

(1) (1876) 1 Q. B. D. 244. (2) (1871) L. R. 6 Q. B. 332.
(3) (1873) L. R. 8 Ch. 597, 609.

The substantial questions in the case are whether the sum claimed is due and recoverable upon the certificate of the master of the *Coahoma County* as a conclusive assessment in pursuance of powers conferred on him by the bill of lading, and if the master's certificate is not conclusive against the defendants, whether upon the contract in the bill of lading a breach has been established in respect whereof damages at common law must be awarded by the Court to the plaintiffs.

The defendants are proprietors of docks at Falmouth, and in July of 1921, being in need of pitch-pine timber for constructional works upon their property, they purchased from London merchants parcels consisting of 43 pieces and 1126 pieces of pitch-pine timber, and 382 pieces of pitch-pine lumber. These parcels were shipped on July 30, 1921, and the plaintiffs' vessel arrived at Falmouth on September 6, 1921. She had on board besides the consignments in question timber cargo for London and grain in bulk. Her discharge began in the afternoon of September 6 and was completed in the afternoon of September 20. The working days occupied were twelve and a half. Upon completion of the discharge the master of the *Coahoma County* issued the certificate in question, whereby he certified 2792*l.* to be due from the defendants in respect of six days' demurrage. He had previously on the same day notified the defendants by letter that he held them liable for demurrage on account of delays and slowness in discharging the cargo of his vessel.

The master's certificate, the validity of which is in question, purports to have been made in pursuance of cl. 8 of the several bills of lading.

Mr. Dunlop claimed that, upon the true construction of the clause, the absence of facilities at Falmouth for discharge of the vessel by her owners in manner specified, and the defendants' failure to receive with such facilities forthwith, involved the defendants in liability for such sums as should be certified by the master to be due to delay thereby caused. He contended also that the defendants must be held, upon the true construction of the bill of lading, to have warranted

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to the plaintiffs the availability at Falmouth of facilities such as are specified in cl. 8, of such a character and extent as to enable the ship to make continuous discharge of cargo during such hours as the master at his discretion should think fit to require, and that the defendants had also come under an obligation to receive from the ship's tackle cargo so discharged at such a rate of discharge as the master in his discretion might direct and be able to make.

On behalf of the defendants it was contended that upon the true construction of the clause the defendants had bound themselves to nothing more than an obligation to take delivery as fast as was reasonably practicable under the circumstances.

In order to apply the terms of the bill of lading to the transaction in question it is necessary to state certain facts. When the *Coahoma County* arrived at Falmouth on September 6, 1921, no deep water berth was available, and owing to the exceptional dimensions and in particular the exceptional lengths of the timber in the cargo, the use of lighters or other craft for the purpose of discharge, was, save as to a small quantity of the goods, out of the question. No facilities were available by means whereof the master or ship's agent could land the timber or put the same into store, warehouse or craft, otherwise than as the same was in fact disposed of in the course of the discharge of the cargo as it took place between September 6 and September 20. Upon being notified of the ship's arrival the defendants named Carrack Roads in the harbour at Falmouth, about two miles from the shore, as a suitable place of discharge; and the master moored his vessel there and proceeded to discharge by delivery of the timber over the ship's side into the water, where it was received by the defendants' agents, formed into rafts, and removed. This was on September 6 the only practicable mode of discharge of the Falmouth consignments. The fact was relied upon on behalf of the plaintiffs as conclusive evidence of the alleged breaches by the defendants of their obligations under the bill of lading.

The first question to be considered upon the construction of cl. 8 is that of the effect of the first sentence therein:

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"The steamer shall be entitled to commence discharging immediately after arrival (without reference to the state of the weather), either into lighters or other craft, or at the quay, or at more than one berth, and discharge continuously, day and night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master, any custom of the port to the contrary notwithstanding." If the words "The steamer shall be entitled to commence discharging, etc., and discharge continuously, etc.," impose obligations upon the receiver of cargo by implication either of a warranty or otherwise, there has been a breach. In my opinion, however, this sentence in the clause must be held to confer a right, power or liberty upon the carrier, but not to imply an undertaking on behalf of the consignee of the goods that facilities shall be available whereby such right, power or liberty shall be made available to the carrier. The provisions in question would restrict the rights of the consignee upon the narrower of two alternative constructions which I have in mind, and upon that construction, therefore, would not be inoperative. The wider construction contended for by the plaintiffs, if it can be arrived at at all, can only be arrived at by implication, and would import into the contract terms not merely oppressive as regards the consignee, but virtually impossible in a business sense to be carried out by him. It would not be in accordance with authority to import unreasonable terms into the bill of lading by implication. In point of fact also the master of the *Coahoma County* accepted the designated place of discharge as a proper place of discharge under the bill of lading. I hold that no breach of contract is made out under the conditions in the first sentence in cl. 8.

The second sentence of cl. 8 imposes a clear obligation upon the consignees to take the goods from the ship's tackle directly on their coming to hand. The liberty reserved to the master to enter and land the goods, etc., is immaterial in the events that have happened. The one question to be determined with regard to the consignees' obligation under this part of the clause is one of fact—Did they receive the

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goods in manner agreed? No facilities were available for discharging into craft or on wharf without delay. I have to determine whether in point of fact the consignees failed to take their goods from the ship's tackle directly on their coming to hand, and whether demurrage at the specified rate is thereupon payable to the amount certified by the master. The question of fact goes to the root of the plaintiffs' alleged causes of action, whether for demurrage or for damages. Mr. Dunlop contended that failure to receive under that part of the clause which I have last mentioned must be found when it appeared that there were not the specified facilities, and that the goods were at any rate not taken from the ship's tackle at the rate specified, but for reasons I have indicated I am of opinion that the failure provided for is failure to take goods from the ship's tackle directly on their coming to hand.

There are facts in the case relevant to both the matters to be decided which would make the master's certificate oppressively erroneous if it be in fact conclusive. A delay of three days was caused by the exposed situation of the place of discharge. Some delay was caused by the battening down of the hatches to protect the part cargo of grain in bulk from damage by rain. Very serious delay was caused by the fact that the timber cargo for discharge at Falmouth was "overladen" by a considerable quantity of the timber cargo shipped for London. I accept the evidence of the defendants as to the effect of these hindrances. There was delay also by the breakdown of a winch or winches.

The master allowed in his calculation of demurrage one and a half days for delay by "overlading," which was an inadequate allowance, and no allowance was made by the master for any of the other causes of delay. Upon reference to the master's certificate, it appears that the delay of six working days in respect of which he assesses demurrage was attributed by him, as authorized assessor of demurrage under the bill of lading, to the situation of the place of actual discharge. What he states is this: "No berth alongside quay and no lighters or other craft were available,

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consequently I was obliged to anchor in mid harbour and to discharge the cargo of timber into the sea. As a result continuous delay took place from the commencement until completion of discharge in consequence of the time occupied in lowering the timber into the water and holding it there until ship's tackle was released by the receivers. Moreover on three days no effective progress in receiving timber from the ship was made on account of rough weather."

At the hearing the real cause of delay which was relied upon by the plaintiffs was the alleged failure of the defendants' men employed at the ship's side to receive the timber at the rate at which the ship was ready to discharge it. One of the plaintiffs' witnesses stated that a delay of about four minutes occurred in the unshackling of each log after it was put over the side. This is, I am sure, an unjustifiable statement. There was a strong conflict of evidence on this part of the case, and the conclusion at which I have arrived is that neither the stevedore's gang who were employed on board the ship by the plaintiffs nor the raftsmen who worked alongside for the defendants were able to handle the unusual lengths of timber as they would have done pieces of smaller dimensions, and that the discharge was therefore made at a slower rate than the normal.

There was no complaint during the discharge, and at the hearing it was not disputed that the raftsmen made the best dispatch in their power and were as good workmen as could have been obtained for the purpose. Such delay as occurred was mutual on the part of the stevedore's gang and the raftsmen, was unavoidable, and was of the kind alone which I have indicated.

I find that the goods were, in the business sense of the words, "taken from the ship's tackle by the consignee directly on their coming to hand in discharge of the ship."

The conclusions of law and findings of fact which I have stated dispose of the case. Had I found a breach by failure to take delivery as agreed I should have been unable to accept the master's certificate as a conclusive assessment of damages. His evidence showed that the delay he assessed

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was not the delay in respect of which he was empowered by the bill of lading to certify for demurrage. The certificate is bad on the face of it.

Had it been material to ascertain the apportionment of the time beyond five days spent in the discharge of timber at Falmouth, I should, so far as I can see, have found the delay by stormy weather to have been three working days, that caused by the mode of stowage of the London and Falmouth cargo, two days, that caused by rain and the ship's management of the hatches for protection of grain cargo together with that caused by disablement of winches, one day, and that attributable to slow handling caused by the character of the cargo and the circumstances of discharge, one and a half days.

Upon the findings I have stated the action fails.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*

Solicitors for the defendants: *Deacon & Co.*

E. C. M. T.

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Jan. 21, 28.

ADMIRALTY.

THE BRITISH TRADE.

Shipping—Wages Suits—Mariners' Contracts—Special Contracts—Damages for wrongful Dismissal—Maritime Lien—Jurisdiction in Rem—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 10—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 167.

A shipmaster or seaman suing under the provisions of the Admiralty Court Act, 1861, on a special contract of service has no maritime lien in respect of damages for wrongful dismissal, inasmuch as such a suit could not have been brought under the ancient jurisdiction of the High Court of Admiralty:—

Semble, the maritime lien which a seaman suing under the ordinary mariner's contract has in respect of wages is not limited to the wages earned while actually on board the ship, but extends to wages due after a wrongful determination of the contract of service.

ACTION IN REM for wages, disbursements, expenses and damages for wrongful dismissal.

The plaintiffs, who were respectively the master and chief

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engineer of the steamship *British Trade*, claimed under agreements in writing of April 18 and 16, 1922, entered into between the respective plaintiffs and the defendants, owners of the *British Trade*, whereby the plaintiffs agreed to serve on the vessel in their respective capacities at wages and on terms set out in the agreements. The plaintiffs entered into the service of the defendants and continued to serve in the ship up to February, 1923, when she was placed in the dock of Messrs. Livingstone and Cooper at Hull. The plaintiffs alleged that they continued to hold themselves at the service of the defendants, but on July 28, 1923, by notice in writing they were informed by the defendants that their wages would cease to be paid on July 31. In their respective capacities as master and chief engineer the plaintiffs made certain necessary disbursements and there were owing to them for wages, expenses and disbursements the sums of 434*l.* 17*s.* 2*d.* and 322*l.* 19*s.* 9*d.* respectively.

The plaintiffs also alleged that the notice from the defendants terminating the payment of wages was in breach of the agreements entered into in April, 1922, and the plaintiffs accordingly claimed damages.

No defence was put in by the shipowners, but one Leonard Bevan, a receiver for a debenture holder, and Rowland Rank, a registered mortgagee, intervened in the action and put in a defence in which they denied the jurisdiction of the Court to entertain the action in rem. They alleged that the company owning the *British Trade* had gone into liquidation and that the intervener Bevan had been appointed receiver on behalf of the debenture holder Rank, who was the registered holder of a debenture for 35,000*l.* and also held a first mortgage on the ship for 35,000*l.*

An appearance was also entered on behalf of Livingstone and Cooper, who claimed to have a possessory lien on the ship for repairs amounting to about 30,000*l.*

A. Stone Hurst for the plaintiff.

Alfred Bucknill for the interveners, the receiver and the registered mortgagee.

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W. H. Owen for Livingstone and Cooper.

[It was stated in the course of the hearing that the mortgagee was prepared to pay off the plaintiffs' claims for wages, expenses and disbursements and then obtain the leave of the Court to be subrogated to their rights against the ship. The interveners, however, denied that the plaintiffs had any maritime lien, giving them priority to the other claimants, for the damages (if any) in respect of the alleged breach of the agreements of service. The arguments and all the cases cited are set out in the judgment.]

Cur. adv. vult.

Jan. 28. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: The plaintiffs are James Ellis Dye, formerly master, and Gerald Stephen Johnson, formerly chief engineer of the steamship *British Trade*. They sue for wages, disbursements and expenses and for damages for wrongful dismissal, and assert a maritime lien in respect of all their claims. The action is defended by a receiver for debenture holders and a mortgagee who have intervened. The ship is the subject of an application for sale, the liquidated claims of the plaintiffs amount to 757*l*. 16*s*. 11*d*. and the amount represented by debentures and mortgages is said to be 70,000*l*. The interveners admitted at the hearing the right of the plaintiffs to be paid the amount of their claims for wages, disbursements and expenses out of the proceeds of the ship. What is in issue between the parties is whether the plaintiffs have, or either of them has, a maritime lien in respect of their several claims for damages. The matters to be mentioned by me will be mentioned only in respect of their bearing, or possible bearing, upon this question.

The vessel upon which the plaintiffs were employed was the property of a company originally called the British World Travel Trades and Cinematograph Expeditions, Ld., and subsequently the British World Trade Expeditions, Ld. The company engaged each plaintiff by an agreement under seal, which dealt with various matters. The project in view appears to have been the conveyance about the world by

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sea of exhibitors and their wares with a view to a floating exhibition of British manufactures. Each plaintiff, as a condition of his engagement, invested money in the company —the master 2000*l.* and the chief engineer 1000*l.* After many months spent in preparation, in course of which the vessel was towed from Tilbury to Southend and proceeded under steam to Hull, the vessel was transferred to a new company and notice was given to the plaintiffs that the old company disclaimed further liability under their respective contracts. The plaintiff Dye had previously given three months' notice to determine his contract, of which one month remained unexpired. The plaintiff Johnson had given no notice.

The argument advanced on behalf of the interveners in opposition to the claim of the plaintiffs to have a wages lien for anything more than wages earned was founded on the proposition that in order to give such a lien the wages must have been, in the words of the Admiralty Court Act, 1861, s. 10, "earned on board the ship" (1), and Mr. Bucknill properly insisted that the existence in the Admiralty Court and in this Division of jurisdiction to deal with all the claims of the plaintiffs under their agreements of service does not necessarily involve a right to a lien. The opinion of Sir Gainsford Bruce against the existence of this lien, as expressed in a well-known work (Williams & Bruce's Admiralty Practice, 3rd ed., p. 202), was relied upon, and in opposition to the claim I was also reminded of a judicial opinion of Lord Gorell that whether such a lien exists is a difficult question.

The difficulty is to be solved by authority and not by opinion. Such as it is, it seems to me to arise not so much from want of authority in decided cases, as from the difficulty there is in making sure with regard to many of the cases

(1) Admiralty Court Act, 1861, s. 10: "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

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whether the existence or non-existence of a lien was material or was adjudicated upon in the several judgments which have to be considered. Inasmuch as before 1861 the Court of Admiralty exercised in its ancient jurisdiction remedial powers in personal suits and suits in rem as well as in suits for the enforcement of maritime liens, and after 1861 had an enlarged jurisdiction over suits of various kinds without extension to the claimants in those suits of rights of lien, the period, and subject matter and result must be scrutinized when the several decisions in question come to be examined. It must be borne in mind too that until 1861 the seaman's lien for wages, enforceable in the Admiralty jurisdiction, was a lien for the wages recoverable in that jurisdiction under what Lord Stowell called a mariner's contract; that a special contract might be proceeded upon at law but not in Admiralty; and that the master of a ship had not the seaman's privileges with regard to wages. The plaintiff Johnson would have had it in respect simply of hiring and service, but the plaintiff Dye would not.

The matters to be considered in detail as to both plaintiffs are, therefore, whether a seaman has a maritime lien in respect of damages for wrongful dismissal from his service under a simple contract; whether the contract relied upon by each is such that service thereunder gives a lien to a seaman and whether they are in substance claiming wages or damages. Further, as to the plaintiff Dye, there is the question whether by virtue of the Admiralty Court Act, 1861, s. 10, and the Merchant Shipping Act, 1894, s. 167 (1), he has a maritime lien under his contract.

The argument on the part of the interveners that a seaman's lien upon the ship for wages exists only in respect of wages earned by the seaman on board the ship in the strict literal sense of these words must be examined in the light of decisions in the Court of Admiralty, which extend over a long period,

(1) Merchant Shipping Act, 1894, s. 167, sub-s. 1: "The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom."

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and under which the seaman's lien has been held to include subsistence money, viaticum, and, as it seems, whatever he could be fairly said to have earned by his services.

In *The Exeter* (1) the ship had been sold in a wages action, and Lord Stowell decreed in favour of a seaman discharged at Colombo on a voyage from Bombay to London payment out of the proceeds of the ship of wages subsequent to his dismissal. In *The Beaver* (2), where a mariner had been put ashore on the African coast on a voyage from Liverpool to Africa and back, the same learned judge determined that the wages recoverable were those due for the whole voyage. Again, in *The Elizabeth* (3), Lord Stowell spoke of the right of the seaman wrongfully discharged to claim wages until the return of the vessel to the original port as one recognized in most countries, and where an enterprise had been determined by frustration in the Baltic he decreed that wages were payable to the time of the seaman's arrival in England. The same rule was applied by the same judge under different circumstances in *The Eliza* (4), where the seaman was given half wages from leaving the ship until his arrival in England. Dr. Lushington in *The Camilla* (5) decreed payment of wages at the contract rate from the date of discharge to the time within the contract period when the plaintiff obtained other employment. On the same footing Dr. Lushington also decided in *The Great Eastern* (6) that a lien exists for damages after wrongful dismissal. *The Blessing* (7) does not raise the question of lien, but lays down that the statutory jurisdiction of the county courts in respect of seamen's wages extends to a claim for damages in lieu of wages. The decision of the Privy Council in *The Ferret* (8) goes to a like question. Lastly, in *The Great Eastern* (9), Chitty J. in 1885 determined in favour of the crew a claim of maritime lien in respect of seamen's wages accrued after a wrongful determination

(1) (1799) 2 C. Rob. 261.
(2) (1800) 3 C. Rob. 92.
(3) (1819) 2 Dods. 403.
(4) (1823) 1 Hagg. Adm. 182.
(5) (1858) Swa. 312.
(6) (1867) L. R. 1 A. & E. 384.
(7) (1878) 3 P. D. 35.
(8) (1883) 8 App. Cas. 329.
(9) (1885) 5 Asp. M. L. C. 511.

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of the hiring. The conflict was between the wages claimants and mortgagees, and wages were held payable to the time of the chief clerk's certificate in the cause.

Having regard to the state of the authorities I cannot say that the amount for which a seaman has a lien under a seaman's contract of service is limited in the way the interveners contend. There are however two other questions to be considered. Are the plaintiffs respectively in point of substance claiming wages under their respective contracts which remain unpaid, or are they claiming damages for breach of contract ? Are their respective contracts such as could have been sued upon in the Admiralty jurisdiction or special contracts ?

The distinction between a claim for wages and a claim for damages under a seaman's contract which has been broken depends upon purely legal considerations. The true view, I think, is that if there has been merely a breach of the contract by the employer the contract subsists and can be made the subject of a simple claim for wages, but on the other hand if the employer has repudiated the contract and the seaman has accepted the repudiation the contract is at an end, and any claim to be made by him in respect of its stipulations is a claim for damages : see *Johnstone* v. *Milling*. (1) It is not clear in the present case that the repudiation of the contracts in question by the owners was accepted by the plaintiffs before the issue of the writ. On this footing a claim for wages might have subsisted until that date.

The plaintiff, the chief engineer, has all a seaman's remedies if he is claiming under a seaman's contract. He may also recover judgment here under a special contract by virtue of various statutes. Whether the plaintiff, the master, has the alleged lien depends upon the combined effect of the provision in the Admiralty Court Act, 1861, s. 10, which gave the Court jurisdiction over any claim by the master of any ship for wages earned by him on board the ship, and s. 167 of the Merchant Shipping Act, 1894, whereby a master is given the same rights, liens and remedies for the recovery of

(1) (1886) 16 Q. B. D. 460.

his wages as a seaman under that Act or by any law or custom.

By virtue of the decisions in *The Sara* (1) and *The Castlegate* (2) I must take it that s. 10 of the Admiralty Court Act, 1861, did not create any maritime lien which had not existed before that Act, but merely conferred upon the Court of Admiralty jurisdiction in cases where previously it had not jurisdiction. As to the chief engineer then, it is necessary to inquire whether his claim arises under a special contract, so that it became cognisable in Admiralty by the Act of 1861, or was a claim such as that Court always had within its jurisdiction. As to the master, the like question arises under the two statutes.

The distinction between a seaman's contract, which was cognisable before 1861 in the Court of Admiralty, and a special contract such as was within the Admiralty jurisdiction by the Act of 1861 was clearly defined when important rights were constantly dependent upon it. Lord Tenterden described the contract which was enforceable in the Court of Admiralty as "a hiring on the usual terms made by word and writing only and not by deed": Abbot on Shipping, 11th ed., p. 511. Lord Stowell discusses it at some length in *The Minerva* (3) under the name of "the mariner's contract," and speaks of it as an ancient instrument in which two stipulations only were necessary—on the part of the owner the description of the intended voyage; on the part of the seaman the rate of wages he was content to accept for his services on that voyage. Whether the contracts here put in suit to ground the claims for damages made by the plaintiffs are such as were cognisable in the Court of Admiralty appears upon examination of them. Each of the agreements was a contract under seal. The employment undertaken by the master is employment not for a voyage but for a year certain and thereafter for a period determinable by notice, and with terms and incidents which arise from his association with the company as a shareholder. The chief engineer's agreement, again, entitled

(1) (1889) 14 App. Cas. 209. (2) [1893] A. C. 38.
(3) (1825) 1 Hagg. Adm. 347, 353.

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him to be employed until the termination of the first voyage and thereafter until determination of the contract by three months' notice in writing or constructive total loss of the vessel. Both of them are, in my opinion, special contracts such as were not within the ancient jurisdiction of the Court of Admiralty.

In view of the admission of the interveners that the plaintiffs have the lien they assert for the wages they in fact earned I have no concern with any question as to whether the existence of special contracts would have prevented the Court of Admiralty from entertaining in the case of the chief engineer, as a seaman, a claim to a lien for wages upon proof of service performed. No such question is raised in this case with regard to either of the plaintiffs. So far, however, as their claims extend to damages they can only be asserted upon proof of the contracts. They therefore could not have been entertained by the Court of Admiralty without the statutory authority of the Act of 1861, and they consequently do not carry with them any right to a maritime lien.

In the circumstances of the case it is not necessary to consider reported decisions in which, where a mariner's contract and a special agreement were embodied in one writing, the Court upon finding the same to be severable decreed in favour of the claim which was within its jurisdiction.

In the result there must be paid out of the fund in Court 434*l.* 17*s.* 2*d.* to the plaintiff Dye, and 322*l.* 19*s.* 9*d.* to the plaintiff Johnson, in pursuance of the submission of the interveners to that effect. The claim of the plaintiffs for a declaration that they have a maritime lien for any amount claimed by them as damages is disallowed.

Stone Hurst. Your Lordship has not found that the plaintiffs are not entitled to proceed in rem for damages. I ask that the damages should be assessed.

THE PRESIDENT. I have not decided whether there is a right to proceed in rem. Do you think it is worth while assessing the damages in view of the fact that there are claims amounting to 70,000*l.* which will have priority ?

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Stone Hurst. It may be worth while.

Bucknill. I do not admit the plaintiffs' right to proceed in rem, but it may be the businesslike course to refer the damages, if any, by consent to the registrar for assessment at the same time as the other matters.

THE PRESIDENT. Very well. There will be an order for the assessment of the damages, if any, by consent.

Solicitors for the plaintiffs: *Flegg & Son.*

Solicitors for the mortgagee and receiver for debenture holders: *Botterell & Roche.*

Solicitors for Livingstone and Cooper: *Dawson & Loncaster.*

E. C. M. T.

PROBATE.

Feb. 14, 24.

In re A. C. COWLING (DECEASED).

JINKIN *v.* COWLING.

Will—Revocation—Partial Tearing of Will—Intention to revoke—Burden of Proof.

When a will is found in the possession of the testator, partially torn, the presumption of law is that the tearing was done by the testator. But the burden of proof that this tearing was done animo revocandi is on the party alleging the revocation. Partial tearing which leaves all the words of the will distinct and legible does not necessarily show an intention to revoke the will.

ANNIE CLOKE COWLING, the testatrix in this action, died on December 1, 1922, a spinster, aged seventy-six. She made a will, dated March 22, 1921, by which, after revoking all previous wills, appointing Thomas James Jinkin and Florence, his wife, her executors, and giving pecuniary and specific legacies to some relatives, proceeded, "I give to my friend Florence Jinkin Beatrice Ave. Plymouth 50*l.* free of duty Also my furniture clothes and effects To my friend Thomas James Jinkin Beatrice Ave. Plymouth the residue of my estate." At the time of making this will the testatrix

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was residing with Mr. and Mrs. Jinkin at 40 Beatrice Avenue. She was an invalid and Mrs. Jinkin looked after her; there was evidence that she was on very friendly terms with her and her husband. Some months after this will was executed Mrs. Jinkin died. The testatrix for a short time lived with Mrs. Smith, a housekeeper of Mrs. Jinkin's, and afterwards with a Mrs. Holloway. When the testatrix died, a cousin, who was manager of the local branch of a bank, was called in to examine her papers. He found the will in question in a locked folding-desk, where the testatrix kept her papers, carefully folded up in an envelope, but torn partly or wholly across, he could not be certain which. When the will was produced in Court it was torn right across into two pieces, but in such a manner that every word of the will was clearly legible. In the same desk, lying loose, was a former will executed by the testatrix in 1919, by which the cousin above mentioned was appointed executor and the residue was given to relatives. The whole estate was valued at 300*l.*

This action was brought by Thomas James Jinkin, who propounded the will of 1921. The defendants were nephews and nieces of the testatrix, who contended that the will of 1921 was revoked, but admitted that the will of 1919 was not restored, and claimed as next of kin of the testatrix.

Noel Middleton for the defendants. The will having been found in the testatrix's possession torn, and there being no evidence as to how it became torn, the presumption of law is that it was torn by the testatrix with the intention of revoking it.

[He referred to Swinburne on Testaments, 7th ed. (1803), vol. iii., pp. 992–3; *Davies* v. *Davies* (1); *Boughey* v. *Moreton* (2); the dictum of Lord Eldon in *Hare* v. *Nasmyth* cited in *Lillie* v. *Lillie* (3); *Lambell* v. *Lambell* (4); and *In the Goods of Lewis.* (5)

THE PRESIDENT. In all those cases something was cut off or struck out, which left the will obviously invalid.]

(1) (1753) 1 Lee Eccl. 444.
(2) (1758) 2 Lee Eccl. 532.
(3) (1831) 3 Hagg. Eccl. 192*n.*
(4) (1831) 3 Hagg. Eccl. 568.
(5) (1858) 1 Sw. & Tr. 31.

Bell v. *Fothergill* (1) shows that tearing is one of the ways of revocation recognized by the Wills Act; and the passage there quoted from Williams on Executors (repeated in 11th ed., vol. i., p. 112) shows that a tear made by the testator must be presumed to have been made animo revocandi.

H. E. Kingdon (*Harold Murphy* with him) for the plaintiff. In all the earlier cases the tearing or mutilation was of such a nature that the document ceased to be a possibly effective will, such as cutting off the signature or, before the Wills Act, the seal.

Elms v. *Elms* (2) is in the plaintiff's favour, for the will was held not to be revoked; and that case and *Doe* v. *Perkes* (3), cited therein, show that the animus revocandi is not a necessary presumption from any tearing but a matter for evidence.

Cur. adv. vult.

Feb. 24. THE PRESIDENT (SIR HENRY DUKE) stated the facts as above and continued: The burden of proof of revocation of this will, which I find to have been duly executed, is upon the defendants. They have not made out that this document was torn in two. They have made out that there was a tear upon the face of it. But the tear was one which, even now that it is complete, does not disable any person who sees the document in its two parts from reading every word of it with certainty. The sheet, in its now completely divided state, remains; and the case comes before the Court to inquire whether it is shown, as against the plaintiff who propounds the document as a will, that within the meaning of the Wills Act the testatrix must be found to have torn the paper or otherwise destroyed it with the intention of revoking it.

The tear, such as it was, must be attributed to the testatrix. That is the result of the authorities. Now, does it appear from an examination of the document, as I see it in the light of the facts, that the testatrix tore the paper,

(1) (1870) L. R. 2 P. & M. 148. (2) (1858) 1 Sw. & Tr. 155.
(3) (1820) 3 B. & Al. 489.

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to the extent to which it was torn, with the intention of revoking it ?

Burning and tearing and other modes of making an end of a testamentary paper are specified in the Wills Act, as they were specified in the Statute of Frauds; but in the Wills Act the particular conduct of the testator which is to be taken to demonstrate conclusively the testator's intention is burning or tearing or otherwise destroying.

I must consider whether it is plain, upon the defendants' evidence and upon the whole of the case, that the testatrix has torn it within the meaning of the expression as it is there used. Mr. Middleton referred me to a good many authorities, and in the course of the case he cited *Elms* v. *Elms* (1), which comes nearer to this present question than most of the others. It so happens, too, that *Elms* v. *Elms* (1) calls attention to another case, *Doe* v. *Perkes* (2), which also very nearly approaches the present facts.

Now the class of cases which were cited to me and upon which the text writers have founded themselves were cases where the testator had cut out his signature or where, under the earlier law, the testator had cut off the seal. The evidence of the execution, both the signature of the testator and the signatures of the attesting witnesses, had been destroyed. Those are simple cases. The facts in each case speak for themselves, and if they are unexplained the act done is a patent act of revocation by a definite and unmistakable mode of revocation.

It is not so with regard to tearing. In point of authority it could not have been so when *Elms* v. *Elms* (1) and *Doe* v. *Perkes* (2) were decided. Those cases show that the nature of the acts and of the surrounding circumstances must be looked at ; and the act done here, the act to be attributed to the testatrix, is the partial tearing across the face of this document in a way which left every word of it legible. This must be taken in connection with the fact that the testatrix had demonstrated the desire to die testate and with the fact that, so far as the evidence goes, there had been no

(1) (1858) 1 Sw. & Tr. 155. (2) (1820) 3 B. & Al. 489.

change in her relationship, that is, in her desire for the persons proposed by the will of 1921 to be benefited, and the further fact that this document with the tear upon it, perfectly legible and containing every part of a good will, had been carefully folded up by the testatrix and put in the place where she would naturally put her will.

I am not satisfied that this will was torn, so far as it was torn, with the intention of revoking it; and I find that the tear was not a tear which in any material or substantial sense destroyed the will; and I find no evidence to show that the tearing was done by way of a symbol of the determination to make an end of the will.

In that state of the case, I propose to pronounce for the will.

It is abundantly clear, unfortunately, that the act or omission of the testatrix which is in question, has become practically of very little importance to anybody after this necessary inquiry with regard to the question whether she died testate or intestate, which results from facts for which the testatrix herself was responsible. I regret to say that the costs of both sides must come out of the very modest estate of which the testatrix was able to dispose.

Solicitors for plaintiff: *Law & Worssam, for Square, Geake & Windeatt, Plymouth.*

Solicitors for defendants: *Kenneth Brown, Baker & Baker, for Foot & Bowden, Plymouth.*

J. R. B.

1923
Feb. 19;
March 12.
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Jan. 24;
Feb. 26.

DIVORCE.

TICKNER *v.* TICKNER.

Divorce—Wife's Suit—Adultery of Petitioner—Discretion of Court—Principles upon which discretion should be exercised—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

As between the parties, two limitations have been fixed by authority on the exercise of the discretion given by s. 31 of the Matrimonial Causes Act, 1857—namely, that the Court cannot give relief to a petitioner whose misconduct has conduced to the adultery of the respondent, or to a respondent whose misconduct has conduced to the adultery of the petitioner. Within those limits and so far as the public interest is concerned the application of a well-known principle like that laid down in *Constantinidi* v. *Constantinidi* [1905] P. 253—namely, that the Court should endeavour to promote virtue and morality and to discourage vice and immorality—is more consistent with the statutory provision creating the discretion of the Court than the determination of cases upon any classification laid down in advance.

THE following statement of facts is taken from the written judgment of the President. This was a wife's petition for dissolution of marriage on grounds of cruelty and adultery of the husband. The marriage took place in 1906. In 1909 the respondent was guilty of adultery and of such ill-usage of the petitioner as compelled her to leave him. In 1921 he was found in cohabitation with another woman, who bore a child of which he was the putative father. Six months after the separation in 1909 the petitioner sought and obtained employment as housekeeper to Mr. W. George Cook with the intention of earning her livelihood. In the course of 1910 she commenced to live with him as his wife. These relations began with an act of intercourse, which, as Cook stated in the witness box, was against her will and by force. Their cohabitation continued until the institution and hearing of the suit. The misconduct of the respondent was indirectly, but not directly, the cause of her relations with Cook. During the period from 1909 to 1921 the petitioner was not in a position from want of means and want of knowledge to take proceedings against the respondent.

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The petition was filed in 1922. It came on as undefended on February 19, 1923, and was adjourned for further evidence till March 12, 1923. On that day the President stated that having regard to the nature of the case he desired to hear counsel for the King's Proctor on the question of the exercise of discretion in such circumstances.

1924. Jan. 24. *Rawlinson K.C.* and *Hon. Victor Russell* for the King's Proctor. The Ecclesiastical Courts borrowed from the later Roman law the doctrines of compensatio criminis expressed by them in the phrase that the petitioner must come into Court with clean hands, and the result is that there is no authority in the reports of those Courts of the exercise of any discretion in favour of a petitioner who had committed adultery except in a case where the adultery had been condoned. It is submitted that the object of the Matrimonial Causes Act, 1857, was only, as stated by Lord Cranworth in *Lautour* v. *Her Majesty's Proctor* (1), to enable divorce a vinculo matrimonii to be obtained judicially instead of applying to Parliament to dissolve the marriage, and not to alter the law.

[THE PRESIDENT. My own view is that the object of the Act was to make a fundamental change in the law of divorce.]

Be that as it may, Lord Penzance in *Morgan* v. *Morgan* (2) lays it down that the discretion must be a regulated one, and not a free option subordinated to no rule. He only recognized three cases in which it had been exercised: (1.) where the petitioner had married again believing the other spouse to be dead; (2.) where the petitioner had been compelled by her husband to lead a life of prostitution; (3.) where the petitioner's adultery had been condoned and had not conduced to that of the respondent. There might be other cases, but they must be such as could be placed in a category capable of distinct statement. That case showed that the Court should look at the conduct of the parties and not at the consequences of the judgment. Those rules were acted on steadily until 1897, when Sir Francis Jeune in *Symons* v.

(1) (1864) 10 H. L. C. 685, 701. (2) (1869) L. R. 1 P. & M. 644, 647.

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Symons (1) held that a husband's misconduct, though not actually conducing to the wife's adultery, might be taken into consideration in exercising the discretion in the wife's favour. Since that time the Court of Appeal have never given any decision inconsistent with the principles laid down in *Morgan* v. *Morgan* (2); but it must be confessed that Courts of first instance have at times departed from those principles. The exercise of the discretion by Sir Francis Jeune in *Constantinidi* v. *Constantinidi* (3) was strongly commented on in the Court of Appeal when the case came before them on the question of varying settlements. (4)

[Counsel also referred to *Wyke* v. *Wyke* (5); *Evans* v. *Evans and Elford* (6); and *Todd* v. *Todd and Cunniam.* (7)]

In *Pretty* v. *Pretty* (8) Bargrave Deane J. broke away from the previous line of the authorities by saying that he must take into consideration all the circumstances of the case and the consequences of his decision. That case has been the cause of much of the subsequent trouble.

[They also referred to *Brooke* v. *Brooke* (9); *Wickins* v. *Wickins* (10); *Holland* v. *Holland* (11); and *Hines* v. *Hines and Burdett.* (12)]

In *Wilson* v. *Wilson* (13) the President took into consideration the interests of the children of the marriage, of a woman who was taking care of them with whom the petitioner was living, and of the petitioner and the respondent, there being no prospect of their coming together again. In that case and *Wilkinson* v. *Wilkinson* (14), before Lord Birkenhead L.C., the exercise of the discretion might be justified by the facts, but the reasons were, we submit, too widely stated. The true rule is that the Court will only consider the conduct of the petitioner, and not the result of the judgment upon other persons.

(1) [1897] P. 167.
(2) L. R. 1 P. & M. 644, 647.
(3) [1903] P. 246.
(4) [1905] P. 253.
(5) [1904] P. 149.
(6) [1906] P. 125.
(7) (1907) 24 Times L. R. 28.
(8) [1911] P. 83.
(9) [1912] P. 136, 205*n*.
(10) [1918] P. 265.
(11) [1918] P. 273.
(12) [1918] P. 364.
(13) [1920] P. 20.
(14) (1921) 126 L. T. 29*n*.

[They also referred to *Armistead* v. *Armistead* (1); *Pointon* v. *Pointon and Sutton* (2); and submitted that the Court should follow the rules laid down in *Morgan* v. *Morgan* (3), as extended by Sir Francis Jeune in *Symons* v. *Symons* (4), not as hard and fast rules, but as laying down a principle.]

Arthur Henderson for the petitioner. In this case the respondent's conduct clearly conduced, though indirectly, to the adultery of the petitioner. She need not, therefore, rely on any interest of third parties, as in *Wilson* v. *Wilson* (5); but her case is within such cases as *Marven* v. *Marven and Turner* (6), and *Pointon* v. *Pointon and Sutton.* (2)

Cur. adv. vult.

Feb. 26. THE PRESIDENT (SIR HENRY DUKE), after stating the facts as above:—In course of a careful review of a long series of decisions, from *Lautour* v. *Her Majesty's Proctor* (7) in the House of Lords, to the numerous recent cases, of which *Wilson* v. *Wilson* (5), and *Wilkinson* v. *Wilkinson* (8) are examples, Mr. Rawlinson, on behalf of the King's Proctor, made it clear that the discretion of the Court has been exercised of late upon broader considerations than were thought to govern it in the years immediately after the coming into operation of the Matrimonial Causes Act, 1857.

In *Lautour* v. *Her Majesty's Proctor* (7) a petitioner, who had lived in adultery after decree nisi, was appellant against the refusal of the Court to make absolute the decree nisi; and in dismissing the appeal the Lord Chancellor, Lord St. Leonards, doubted whether the Court was at liberty to pronounce a decree in the petitioner's favour. He applied to the discretion the limits which had been observed in the Ecclesiastical Courts and in the practice of Parliament upon bills for divorce. Lord Chelmsford declared the exercise of discretion in the case in question to have been "very

(1) (1922) 38 Times L. R. 626.
(2) (1922) 38 Times L. R. 848.
(3) L. R. 1 P. & M. 644.
(4) [1897] P. 167.
(5) [1920] P. 20.
(6) (1919) 122 L. T. 227.
(7) 10 H. L. C. 685.
(8) (1921) 126 L. T. 29*n.*

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wholesome"; and Lord Cranworth considered it would have been extremely wrong if the Court had exercised its discretion otherwise than as it had. On the general question, however, Lord Cranworth said guardedly that he did not know that he quite agreed with the Lord Chancellor on the question of discretion, though he thought that very likely there might be cases in which there was a larger discretion in the Court than that noble Lord thought it expressed.

Lord Penzance specified in *Morgan* v. *Morgan* (1) three cases in which a petitioner, guilty in fact of adultery, might be granted a decree: where the adultery was an incident of a supposed marriage contracted in the belief that the respondent was dead; where the respondent had been the cause of the fact in question; and where the fact had been condoned by the respondent and had not led to the respondent's misconduct. Lord Penzance added that there might be other classes of cases, but that they ought not to be other than such as can be placed in a category capable of distinct statement and recognition, and that there would be great mischief in assuming a right to grant or withhold divorce upon the mere footing of the petitioner's adultery being more or less pardonable or capable of excuse.

Lord St. Helier in *Symons* v. *Symons* (2) laid stress upon the general principle expressed in *Morgan* v. *Morgan* (1), and emphasized the injustice of refusing at a respondent's instance a decree to a petitioner guilty of misconduct, if the misconduct of the petitioner had been caused by misconduct of the respondent. In *Constantinidi* v. *Constantinidi* (3) Lord St. Helier granted a decree on the ground thus indicated to a husband where infidelity—continued at the hearing of the cause—was palliated, if not accounted for, by gross misconduct of his wife.

The decision of Lord St. Helier in *Constantinidi* v. *Constantinidi* (3) led to a discussion in the Court of Appeal in a later proceeding in the same suit; and although the exercise of the discretion was not under review, the Lords

(1) L. R. 1 P. & M. 644. (2) [1897] P. 167.
(3) [1903] P. 246.

Justices stated a principle, controlling the discretion, which is of general application. It was stated by Vaughan Williams L.J. in these words (1): "the Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer respectively inter se, but also to the interests of society and public morality." Stirling L.J. stated the rule thus (2): "in the exercise of every discretion which is vested in the Court, the Court should endeavour to promote virtue and morality and to discourage vice and immorality."

In the argument on behalf of the King's Proctor stress was laid on the importance of maintaining the method of classification of causes which is prescribed in *Morgan* v. *Morgan*. (3) Uniformity in the exercise of the powers of the Court could no doubt be secured by this means, and in particular it would be possible by its observance to avoid the occurrence of cases—some of them cited by Mr. Rawlinson—which ex facie have the appearance of being in conflict on the point whether a state of things, such as exists in this case, must of necessity prevent the grant of a decree. But to refuse relief to a suitor who, in the language of old authorities, "does not come with clean hands," is not so obviously simple a course as may be thought when, as between the parties here, there are facts which explain or extenuate the plight of the claimant for relief, and as regards the public interest there are weighty considerations for and against the decree which is sought. A rigorous application of a system of classification does not in all cases solve the problem satisfactorily.

Two limitations suggest themselves, for which there is authority. As between parties a petitioner may not claim divorce on account of misconduct to which the petitioner has conduced; and on the same principle, as was explained in *Symons* v. *Symons* (4), a respondent may not rely upon misconduct of a petitioner to which the respondent has conduced.

So far as the public interest is concerned the application

(1) [1905] P. 253, 270.
(2) [1905] P. 278.
(3) L. R. 1 P. & M. 644.
(4) [1897] P. 167.

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of a well-known principle, such as that stated in the Court of Appeal in *Constantinidi* v. *Constantinidi* (1), seems to me more obviously consistent with the statutory provision under which the discretion of the Court arises than does the determination of cases as they arise upon a classified system laid down in advance. The statutory provision is that in the case of a petitioner for divorce who has been guilty of adultery the Court "shall not be bound" to pronounce a decree; and, as was said by Swinfen Eady M.R. in *Wickins* v. *Wickins* (2): "where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised."

At the hearing it was submitted that in this case it would be possible to find that the present position of the petitioner has been conduced to by the misconduct of which I have found the respondent to have been guilty, and that the danger of unregulated exercise of the discretion of the Court would thereby be avoided. It was said too that the decisions in *Wilson* v. *Wilson* (3) and *Wilkinson* v. *Wilkinson* (4) could also have been, by means of such a finding, brought into harmony with earlier decisions, so as to range them within one of the classes specified in *Morgan* v. *Morgan* (5) and *Symons* v. *Symons*. (6) Such a course would, I apprehend, effect an apparent rather than a real compliance with the requirement of conformity to classification, for I do not regard this case as one which falls within either of the three specified classes of cases defined in *Morgan* v. *Morgan* (5), even if it may properly be dealt with in the spirit of that decision.

I propose to deal with the case upon broader grounds. It is an exceptional case. If this suit had been defended it would, in my judgment, have been right to over-rule any plea of the respondent founded upon the conduct of the

(1) [1905] P. 253.
(2) [1918] P. 265, 272.
(3) [1920] P. 20.
(4) 126 L. T. 29*n*.
(5) L. R. 1 P. & M. 644.
(6) [1897] P. 167.

petitioner. Whether in that state of the facts it is right to grant the petitioner a decree must, as was stated by the Lords Justices in *Constantinidi* v. *Constantinidi* (1), and afterwards by Lord Gorell in *Evans* v. *Evans and Elford* (2), be determined with due regard to the interests of society and of public morality. The present petitioner was and remains a woman grievously wronged. What I have really to determine is whether on grounds of public policy, and by way of example, she ought to be left under a disability to contract a new marriage until she is set free by the death of the respondent. To apply the test stated in *Constantinidi* v. *Constantinidi* (1), I do not think virtue and morality will be promoted by a decision having that effect. I, therefore, exercise my discretion under the statute by granting a decree nisi in accordance with the prayer of the petition.

Solicitors for petitioner : *Alfred Cox & Son, for Walter H. Day, Maidstone.*

The King's Proctor.

(1) [1905] P. 253.

(2) [1906] P. 125.

J. R. B.

C. A.

1924

Jan. 22, 23, 24.

[IN THE COURT OF APPEAL.]

HARNETT *v.* HARNETT.

Restitution of Conjugal Rights—Sincerity of Applicant—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 17, 22—*Matrimonial Causes Act,* 1884 (47 *&* 48 *Vict. c.* 68)—*Divorce Rules, r.* 175.

The former doctrine of the Ecclesiastical Courts that there was no defence to a suit for restitution of conjugal rights but a matrimonial offence by the petitioner, is now, having regard to s. 175 of the Divorce Rules, no longer law.

It is essential to the success of a petition for restitution of conjugal rights that the petitioner should prove that he or she has a sincere desire for a real restitution of those rights and a corresponding willingness to render them to the other spouse.

Palmer v. *Palmer* [1923] P. 180 followed.

Decision of Hill J. p. 41 ante affirmed.

APPEAL from the decision of Hill J. (1)

The parties in this case were married on April 15, 1916, and had lived together in Scotland and at Lisnacree House, Lisnacree, in County Down, Ireland. There was one child of the marriage, a boy, born on January 3, 1917. This petition was filed by the wife on April 12, 1922, alleging that her husband refused to live with her, and praying for restitution of conjugal rights. The husband was an officer in the Royal Air Force, stationed at the date of the petition at the headquarters of that force in London. During part of their married life the husband had been serving as a volunteer in the English forces in Ireland. The parties had never had a permanent home. They had lived together, with some violent quarrels, but on the whole not unhappily, in various places in England, and for some time with the wife's parents at their home in Ireland. In February, 1921, the wife had to go into a nursing home in Ireland for an operation. After she came out the parties did not live together; she alleged that the separation was wholly due to the husband's refusal to return; he contended that his wife's conduct and temper had caused the separation, and that he had always

(1) Ante p. 41.

been willing to renew cohabitation. Neither party accused the other of any actual matrimonial offence.

The petition first came on before Hill J. on November 15, 1923; it was then part heard and adjourned to November 21, when the hearing was resumed.

At the close of the petitioner's evidence, Hill J. said that he was not satisfied that she was sincere in asking for restitution, and asked the respondent's counsel if he would take the responsibility of accepting a decision on that ground. Counsel for the respondent said he desired a decision on that ground, and forbore from calling evidence on the husband's behalf.

Hill J. said that in the recent cases of *Williams* v. *Williams* (1) and *Mann* v. *Mann* (2) it was held that the petitioner must show a sincere desire, not merely for a decree, but for the reality of a return to conjugal rights; and those cases were confirmed by the decision of the Court of Appeal in *Palmer* v. *Palmer*. (3) He was satisfied in this case that the petitioner had no such sincere desire, and he accordingly dismissed the petition.

The wife appealed.

Bayford K.C. and *W. O. Willis* for the appellant repeated in substance the arguments for the appellant used in the Court below.

The respondent appeared in person, but was not called upon to argue.

The Court of Appeal expressed their agreement with the conclusion at which Hill J. had arrived on the facts. The judgments are reported only so far as they deal with the question of law raised.

POLLOCK M.R. This is an appeal from a decision given by Hill J. in this suit, which was a petition by the wife for restitution of conjugal rights, and the decision was reached on the grounds stated, that the wife had no sincere desire for

(1) [1921] P. 131, 133, 135.
(2) [1922] P. 238.
(3) [1923] W. N. 218; 156 L. T. Newsp. 41. Since reported [1923] P. 180.

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Pollock M.R.

the resumption of cohabitation, but only for a decree for restitution.

The petition was filed on April 12, 1922, and was served on June 2, 1922. The answer of the husband alleged that the request of the wife for restitution of conjugal rights was not bona fide, and it was on that issue that the judge decided the case. The parties were married on April 15, 1916, and on January 3, 1917, a son was born. The learned judge has given careful consideration to the case and heard it during a two-days' trial on November 15 and 21, 1922, and in his judgment has stated that he came to the conclusion that there was no sincere desire on the part of the wife for restitution of conjugal rights.

On this appeal two points have been taken on behalf of the wife, first, that the judge was wrong in the conclusion he arrived at on the facts that there was no sincere desire on her part for the resumption of cohabitation, and secondly, that he was wrong in point of law in holding that it was essential that there should be a sincere desire for restitution of conjugal rights, and that in fact the wife was entitled to a decree for restitution ex debito justitiæ, the question of sincerity not being recognized as one material in law to her success in her petition.

On the question of law raised on this appeal as to whether or not it is essential on a petition for restitution of conjugal rights that the spouse presenting the petition should be sincere in her desire to return and resume cohabitation, in my judgment this Court is bound by the recent decision of this Court in *Palmer* v. *Palmer*. (1) It seems impossible in view of the clear words of Sir Henry Duke P. and Warrington and Atkin L.JJ. to say that if the argument for the wife presented to us had been presented to that Court it would have been held that bona fides had nothing to do with the granting of a decree. That decision, in my view, was right, and is binding on this Court, and for myself I should agree with the judgments which were given in that case. It is a startling proposition to say that in these days good

(1) [1923] P. 180.

faith in such a case is unnecessary. Whatever may have been the practice in the old Ecclesiastical Courts it is now provided by r. 175 of the Divorce Rules that a petition for restitution of conjugal rights must be founded upon an affidavit of the petitioner, who must therein satisfy the registrar that a written demand for cohabitation and restitution has been made. If the questions of bona fides and sincerity were unnecessary, that form of procedure would appear to me to be grotesque. I think, therefore that this Court is bound by the decision in *Palmer* v. *Palmer* (1), and therefore on that authority the judgment of Hill J. was right on the point of law, and consequently the appeal must be dismissed.

WARRINGTON L.J. The point of law raised in this suit—namely, whether it is essential to the success of a petition for the restitution of conjugal rights that the petitioner should have a sincere desire for a real restitution of those rights, with a corresponding willingness to render them to the other spouse—is covered by the decision in *Palmer* v. *Palmer*. (2) In that case Sir Henry Duke P. said: "Under these circumstances if the Court is satisfied of good faith on her part, and that there is evidence that she is really desirous that her husband should return to her, I think she is entitled to the decree for which she asks." Atkin L.J. said: "If the judge had been satisfied that there was no desire upon the part of the wife to return to her husband that would have been a ground for refusing to grant the decree." And the third member of the Court pointed out that the learned judge in the Court below had failed to see that the position which he had taken up was inconsistent with the desire of the wife that her husband should return to her. Therefore all three judges of the Court of Appeal in that case decided, and I think intended to decide, the point of law which has been argued before us and we are bound by that decision in *Palmer* v. *Palmer* (1), and ought therefore to hold in this case that the judge, coming as he did on the facts to the

(1) [1923] P. 180. (2) [1923] P. 180, 182, 183.

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Warrington L.J.

conclusion that the wife had no sincere desire for the return of her husband and was therefore not acting bona fide in seeking a decree, he was justified in refusing to grant the decree asked for. I now see no reason to alter the view I took in *Palmer* v. *Palmer* (1), and having regard also to r. 175 of the Divorce Rules requiring the petitioner for restitution of conjugal rights to file an affidavit satisfying the registrar that a written demand for cohabitation had been made, I cannot believe that in requiring evidence of that kind it was intended that such a demand should be a mere hollow sham. Therefore I think the judge was right in dismissing the petition on the view he took of the facts. [The Lord Justice then stated that he was not prepared to reverse the decision on the facts.] The appeal therefore fails and must be dismissed.

ATKIN L.J. I agree. To my mind the decision in *Palmer* v. *Palmer* (1) concludes the question so far as we are concerned. Although it is quite true that in that case the point was put rather differently, yet, speaking for myself, I think that in giving my judgment the point of law now raised as to the necessity for bona fides on the part of a petitioner was not absent from my mind, and I am satisfied that that was the view of the other members of the Court. In stating the law in the way we did we were giving effect to other decisions of this Court—namely, *Mackenzie* v. *Mackenzie* (2) and *Russell* v. *Russell.* (3) That being the law, the question is, Do the facts here bring the case within that rule of law? Are we satisfied that the judge has come to a wrong conclusion on the facts?

[The Lord Justice answered that question in the negative.] The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Leman, Chapman & Harrison, for E. & R. D. Bates, Belfast.*

Solicitors for respondent: *Hargreaves & Crowthers.*

(1) [1923] P. 180. (2) [1895] A. C. 384.
(3) [1895] P. 315; [1897] A. C. 395.

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1924
Feb. 13.

THE SAXICAVA.

Shipping — Practice — Discontinuance of Action — Notice of Counterclaim — Setting up Counterclaim otherwise than in a Pleading—Rules of Supreme Court, Order XIX., *r.* 3—*Order* XXI., *rr.* 10, 16—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24.

A notice of counterclaim contained in correspondence passing between plaintiff's and defendant's solicitors is not sufficient to "set up" a counterclaim within the meaning of Order XXI., r. 16, so that the counterclaim may be proceeded with if the plaintiff's action is stayed, discontinued or dismissed.

Per Bankes and Scrutton L.JJ. The counterclaim must at least be set up by some proceeding which is either directed by or recognized by the rules and in respect of which there is a record on the files of the Court.

APPEAL from a decision of Sir Henry Duke P., on a summons, adjourned into Court for argument. (1)

The case came before the Court on appeal from the refusal of the Assistant Admiralty Registrar to make any order on the defendants' application that the plaintiffs be ordered to file a preliminary act. The summons was taken out to raise the question whether a counterclaim had been sufficiently "set up" within the meaning of the Rules of the Supreme Court, so as to enable the defendants to proceed with it after the plaintiffs had given notice of discontinuance of their action.

It appeared that on September 12, 1923, a collision took place between the Greek steamship *Despina*, belonging to the plaintiffs, and the steamship *Saxicava*, belonging to the defendants, the Anglo-Saxon Petroleum Co., Ld. On September 13 the plaintiffs instituted an action in rem in the Vice-Admiralty Court at Gibraltar, but after correspondence between the respective solicitors it was withdrawn. On September 14 the defendants issued a writ in rem in this country against the owners of the *Despina*, but, as the *Despina* had been sunk and her owners were foreigners,

(1) [1924] W. N. 59.

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the action was not proceeded with. On September 17 the owners of the *Despina* and her master, officers and crew issued the writ in personam in the action now in question against the Anglo-Saxon Petroleum Co. In this action the defendants desired to set up a counterclaim. The plaintiffs' solicitors were aware from the correspondence which had taken place between the parties that the defendants intended to put forward a counterclaim, but on January 5, 1924, the plaintiffs filed a notice of discontinuance of the action. Thereupon the defendants took out a summons for an order that the plaintiffs should be ordered to file their preliminary act, so that the counterclaim might be preserved and proceeded with.

The learned President, in dismissing the appeal, said that it was not necessary for him to consider whether Order XXI., r. 10, which provided for setting up a counterclaim in the defence, was exhaustive ; the procedure under the Judicature Act and the rules permitted the trial of cases upon affidavit —particularly by reason of the Order XIV. procedure in the King's Bench Division. He had no doubt also that in the Admiralty Court an action might proceed to trial upon preliminary acts if the substance of the matter admitted of it, and in that case there would be no counterclaim set up in the strict sense of the rules. In the present case, however, there was no affidavit ; there was nothing in the cause. There was correspondence ; and there was express notice of the right to maintain a counterclaim. There was a discussion upon the footing of it, and the appellants thought they had got an undertaking for bail. They had not made that out. The question was whether correspondence between the parties not establishing agreement as to bail, but giving notice of a counterclaim, was sufficient to set up a counterclaim. In his opinion, it would be entirely contrary to the plain meaning of the rules, or any extension of them which was consistent with their general tenour, to hold that a counterclaim might be set up by notice outside the action, without any setting of it up by any proceedings in the action. He gave leave to appeal.

Langton (*Raeburn K.C.* with him) for the appellants. Although the rules speak of setting up a counterclaim they afford no guidance as to what is meant by "setting up." It is submitted that "setting up" merely means giving notice, and that if the plaintiff is fully aware of the defendant's intention to counterclaim the rules are sufficiently complied with. The words "setting up" are obviously used in different senses in the rules; they cannot mean that a counterclaim can only be pleaded in the defence (Order XXI., r. 10), as the setting up of a defence under Order XIV. procedure (Order XIV., r. 4) must have reference to setting up by an affidavit: see *Whiteley's Case* (*In re General Railway Syndicate*) (1); see also *Bildt* v. *Foy* (2), where there was a distinct intimation by Lord Coleridge C.J. that in his opinion a counterclaim could be set up otherwise than in the defence. The case was disposed of upon equitable grounds, but Lord Esher in the Court of Appeal said that the question was a very serious one to be decided, if need be, by the whole Court. Although in the present case the notice of counterclaim was not set up by affidavit, the plaintiffs were not only aware of the impending counterclaim, but there had been discussion as to the amount which would be required for bail; and the reason the appellants issued the writ in rem against the *Despina* was that they understood the owners of the *Despina* would appear and give bail. *The Salybia* (3), in which Bigham P. said that a counterclaim could not be set up by "a mere casual reference" in a letter, is distinguishable, as the plaintiffs' action had been discontinued before there was any mention of the counterclaim. In this case the appellants from the earliest possible stage have taken every practicable step to endeavour to prosecute their claim.

C. R. Dunlop K.C. and *Balloch* for the respondents were not called on.

BANKES L.J. I wish personally that I could do something here to assist the defendants, but I am afraid the language of

(1) [1900] 1 Ch. 365. (2) (1892) 9 Times L. R. 34, 83.
(3) [1910] P. 25.

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the rules is too strong, and in substance I entirely agree with the view taken by the learned President. The material facts are as follows: There having been a collision between the *Despina* and the *Saxicava*, the owners of the *Despina*, the vessel that was sunk, started proceedings in rem in Gibraltar. Subsequently, the respective solicitors got into communication as to whether it would not be better to commence proceedings in England and discontinue the proceedings in Gibraltar. That course apparently was agreed to, and the owners of the *Despina*, who were Greek subjects, commenced an action in personam in this country against the owners of the *Saxicava*, and the latter started an action in rem in this country by issuing a writ, with which it was impossible for them under the circumstances to proceed, because the *Despina* was at the bottom of the sea. However, they did issue this writ, and I think the strongest point that has been made in their favour is that they did in fact take that legal proceeding, and proceed as far as they could go with it—namely, the issue of the writ. It was obviously anticipated in the first instance that the rival claims—because there were rival claims, the owners of each vessel blaming the owners of the other—should be proceeded with in this country, and it was only because of some misunderstanding about the giving of security that ultimately the owners of the *Despina* discontinued their action before it had proceeded beyond an appearance. The defendants, under these circumstances, are placed in a difficulty. They had commenced this action in rem with which they could not proceed, and they have now taken these proceedings in personam against the owners of the Greek vessel in this country to try and establish, if they can, that they have not lost their right of counterclaim by reason of the discontinuance by the plaintiffs of their action.

Now, the difficulty in which defendants, who have within the meaning of the rules set up a counterclaim, might be put in the event of the plaintiff discontinuing, had to be met by a special rule—namely, Order XXI., r. 16: "If, in any case in which the defendant sets up a counterclaim, the action of the plaintiff is stayed, discontinued, or dismissed, the

counterclaim may nevertheless be proceeded with." The object of that rule and the necessity for it are obvious, because the right of counterclaim takes its origin from s. 24 of the Judicature Act of 1873, which gives the Court power to grant to a defendant all such relief against a plaintiff as the defendant shall have properly claimed by his pleadings. The effect of discontinuing is to remove the plaintiff from the proceedings; and, therefore, unless the difficulty was provided for by other rules dealing with the matter, the defendant's case would no longer come within the language of s. 24 in the event of the plaintiff disappearing from the action by means of discontinuance. Accordingly, this rule is framed, and it uses the expression "sets up," of which there is no definition in the rules; but from the rules themselves it appears that it is used in a different sense with reference to different subject matters. For instance, Order XIV., r. 4, deals with a case of an application by a plaintiff under Order XIV. for judgment: "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim," and so forth. The "setting up" there must necessarily refer to a setting up in an affidavit, because at that stage of the proceedings there is no other process by which the defendant can set up this defence. It is plain, therefore, that the phrase "set up" is not used in the rules always in the same sense. But it seems to me that "set up" can only refer to some step in the proceedings which is either directed by or recognized by the rules, because it is in reference to such matters only that the rules are dealing; and when it speaks of setting up a defence it must mean set up in some proceeding which is recognized or directed by the rules. Under Order XIV. the proceeding is by way of affidavit, but when one comes a stage further and refers to pleadings it seems to me that Order XXI., r. 16, in speaking of "setting up," must refer to a setting up in a pleading, or, at any rate, in some proceeding which is recognized or directed by the rules, and which becomes part of the record, or something which is filed in the Court.

We have been referred to three authorities, and it is plain from two of them that the Court considered that a counterclaim

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Bankes L.J.

which was set up by way of affidavit was sufficient, and, in one of them, although it was not set up under Order XIV. In *Bildt* v. *Foy* (1) the facts were that a sum of 800*l.* had been paid into Court and the plaintiff desired to get it out; the defendant desired that it should remain where it was, and by affidavit he asserted, and in that sense set up, that he had got a counterclaim, and that, therefore, until that was disposed of, the Court ought not in the exercise of its discretion to order the money to be paid out. The Divisional Court, and the Court of Appeal, also, thought that the assertion by the defendant of the existence of the counterclaim was a sufficient setting up of the counterclaim to prevent the plaintiff, who subsequently discontinued, from saying that the defendant had no right to proceed with the counterclaim. In *Whiteley's Case* (*In re General Railway Syndicate*) (2) the counterclaim was set up in an affidavit under Order XIV., and the Master of the Rolls, in the part of his judgment referring to this matter, says: "Now, it is true that the petition to wind up was presented before he could put in his counterclaim. If he had put in his counterclaim the case would not have been arguable. The difficulty arises from the fact that he had not put in his counterclaim. But he got leave to defend upon the affidavit to which I have referred, and I think that he did all that could be reasonably expected to assert in a legal proceeding his right to repudiate these shares. That is the principle on which the Courts have acted in several cases." I do not think I need refer to *The Salybia* (3), except to say that there Bigham P. seems to have taken a very strong view about the contention that it was sufficient to set up a counterclaim in order to bring the defendant within the rules if he has simply asserted it or referred to it in correspondence, because the learned judge speaks there of a mere casual intention to prefer a counterclaim.

Under these circumstances, I confess with regret, but still with a clear view, I have come to the conclusion that this appeal must be dismissed with costs.

(1) 9 Times L. R. 34, 83. (2) [1900] 1 Ch. 365, 369.
(3) [1910] P. 25.

SCRUTTON L.J. The defendants desire to proceed with a counterclaim against the plaintiffs, who have discontinued their action. Whether they can do so or not turns on Order XXI., r. 16, which confines their right to go on with the counterclaim to cases where they have "set up" a counterclaim, and the question is as to the meaning of these words in the rule. There is nothing on the files of the Court, or in the proceedings of the Court, to show that they have ever set up any counterclaim. But what is alleged to be a setting up of a counterclaim is that the defendants' solicitors have written a letter to the plaintiffs' solicitors saying that the defendants are going to set up a counterclaim. The question is: Is that within the meaning of these rules, "setting up" a counterclaim?

The right to counterclaim arises from the Judicature Act of 1873, s. 24, sub-s. 3 of which provides that the Courts shall have "power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading. . . . ." When one looks at the rules relating to pleading they all appear to assume that the counterclaim will be begun by a pleading and will be set up by a pleading. By Order XIX., r. 3: "A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim," and so on. And when one inquires how he is to set up by counterclaim one finds a series of rules beginning with Order XXI., r. 10: "Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his defence, state specifically that he does so by way of counterclaim." Rule 11 is to the same effect: "Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counterclaim were to be enforced

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by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff." Rule 15 is: "Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply, apply to the Court or a judge for an order that such counterclaim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just."

It appears to me that setting up a counterclaim must be done by something which is recorded in the Court. I do not think it is necessary to decide in this case whether setting it up in an affidavit under Order XIV. as a defence to a claim, or as a reason why execution should not issue or judgment be given on a claim, is "setting up" a counterclaim or not, because there is nothing of that sort in this case, but it seems to me clear that one cannot extend it to a mere notice from the defendant to the plaintiff. I am not certain whether the learned counsel who argued this case contended that oral notice would do. Here we have solicitors communicating with each other over the telephone and disagreeing as to what has happened. One is in the realms of uncertainty, and the rules limit dealing with counterclaims to matters in respect of which there is a record on the files of the Court.

SARGANT L.J. Order XXI., r. 16, deals with the setting up of a counterclaim and refers to some definite step in the proceedings, but I do not think that the phrase "sets up" is satisfied by a general intimation outside the proceedings of the intention of the defendant to proceed by way of counterclaim. The phrase "sets up" in that rule must have the same meaning as in the immediately preceding rule, and in the other two rules to which Scrutton L.J. has referred, rr. 10 and 11. Each of these rules, as it seems to me, is a definite legal step in the delivery of the

counterclaim, which is, for the purpose of the counterclaim, the commencement of the action. I agree with the view, which I think was indicated by Bankes L.J., that in the case of an affidavit under Order XIV., the setting up there is a setting up for the purpose of the particular proceeding contemplated by that Order, and I do not think myself that the filing of the affidavit under Order XIV. could be a setting up of the counterclaim for any purpose except the purpose of replying to the plaintiff's attempt to get judgment. It seems to me that in the rules as to pleadings under Order XXI. the setting up of the counterclaim means the delivery of the counterclaim according to the rules.

With regard to the cases that have been cited the only one to which I wish to refer is *Whiteley's Case.* (1) I do not think that case has any definite bearing on the matter here. The point to be decided there was this: A winding-up petition had been presented; and it is well ascertained law that in order to obtain a rescission of his contract it is absolutely necessary for the shareholder to have commenced his action before the presentation of the winding-up petition. He has got to take some legal step for the purpose of announcing his claim to obtain a rescission of his contract to take up shares; and the Court in that case held that the repudiation set up in his affidavit some ten days before when resisting the claim for calls made under Order XIV. was a step in the legal claim for rescission, which was sufficient to render him at liberty to pursue that claim for rescission, notwithstanding that the petition for winding up the company had been presented before the actual issue of the proceeding.

Appeal dismissed.

Solicitors for the appellants: *Waltons & Co.*
Solicitors for the respondents: *W. A. Crump & Son.*

(1) [1900] 1 Ch. 365.

E. C. M. T.

C. A.
1924
Feb. 11, 12, 22.

[IN THE COURT OF APPEAL.]

THE KOURSK.

Shipping—Collision—Innocent Ship damaged by two wrongdoing Vessels—Judgment recovered against one Tortfeasor—Judgment unsatisfied—Right of subsequent Recovery against other Tortfeasor—Tests of a joint Tort.

Persons are not joint tortfeasors merely because their independent wrongful acts have resulted in one damnum.

By separate and independent acts of negligence on the part of each vessel a collision took place between the *C. C.* and the *K.* As a direct consequence of that collision, and without any intervening act of negligence, the *C. C.* ran into and sank the plaintiffs' vessel. The plaintiffs, having recovered judgment against the owners of the *C. C.* (who limited their liability), brought an action against the owners of the *K.* in respect of the same damage:—

Held, that the causes of action were separate and distinct; that accordingly the owners of the *C. C.* and the owners of the *K.* were not joint tortfeasors; and, therefore, that the judgment recovered against the owners of the *C. C.* was not a bar to the plaintiffs' action against the owners of the *K.*

Judgment of Hill J. [1923] P. 206 affirmed.

Appeal from a decision of Hill J. in an action of damage by collision.

The appellants (defendants) were the owners of the steamship *Koursk*; the respondents (plaintiffs) were the owners of the steamship *Itria*.

The following statement of the facts is taken, in substance, from the judgment of Sargant L.J.:—

On April 18, 1918, a convoy of five vessels under escort were in the Mediterranean making for the United Kingdom in line abreast, with a prescribed distance of four cables between each adjoining pair of vessels. The centre ship, and that from which the distances had to be taken, was the *Itria*; nearest to her on her port hand was the *Clan Chisholm*; and beyond this ship again and furthest to port was the *Koursk*. The course prescribed was a zig-zag changed at short intervals of fifteen, ten, and five minutes. The ships were proceeding without lights and in the dark, the time of the collision being just before 3 A.M. A few minutes before that hour the *Koursk* got out of position and was

observed heading for the *Clan Chisholm* at a distance of about $1\frac{1}{2}$ cables. The *Clan Chisholm* hard-a-ported, hoping to avoid collision or to receive a slanting blow only; but did not reverse her engines. A collision ensued between the *Koursk* and the *Clan Chisholm*; and within about a minute this was succeeded by a second collision between the *Clan Chisholm* and the *Itria*, which sank the latter vessel.

As the result of these collisions four actions were begun. There were cross-actions between the *Koursk* and the *Clan Chisholm*; there was an action by the *Itria* against the *Clan Chisholm*; and there was the present action by the *Itria* against the *Koursk*. The *Koursk*, however, being under requisition to the British Government, was not arrested, and the latter action did not proceed to trial with the other three actions, which were heard in March, 1919, by Hill J. The result of his judgment, as ultimately restored by the House of Lords after an intermediate reversal, was that in the actions in respect of the collision between the *Koursk* and the *Clan Chisholm* the *Koursk* was found two-thirds to blame and the *Clan Chisholm* one-third to blame (her contributory negligence consisting in not having reversed before the first collision). In the action by the *Itria* against the *Clan Chisholm* judgment was given against the *Clan Chisholm*, it being admitted that the *Itria* was blameless, and the finding that the *Clan Chisholm* was to blame in respect of the first collision involving the finding that she was also to blame for the immediately subsequent collision.

The present action by the *Itria* against the *Koursk*, which meanwhile had been released from requisition, was tried by Hill J. in June, 1923, and by agreement between the parties the materials which had been used on the previous trial in March, 1919, were again used. At this second trial the *Koursk*, while not questioning the finding of fact that the first collision was due partly to the negligence of the *Koursk*, raised two defences: (1.) That the second collision was proximately caused, not by the first collision, but by an intervening act of negligence on the part of the *Clan Chisholm* subsequent to the first collision—namely, a second failure to

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reverse. (2.) That even if the causation of the first collision and the second collision was indistinguishable, they were caused by the joint tort of the *Clan Chisholm* and the *Koursk*, and that the *Itria* having recovered judgment against one of the joint tortfeasors was barred from recovering against the other.

Hill J. found there was no intervening negligence between the two collisions, that the second collision was the direct and immediate consequence of the first, and that the causation of the two was indistinguishable. As regards the second defence the learned judge decided that though there was but one damage it was caused by two separate acts of negligence; that there were therefore two separate torts, and that the owners of the *Itria* were still entitled to recover against the owners of the *Koursk*.

The owners of the *Koursk* appealed.

1924. Feb. 11. On the appeal on the question of fact as to whether the *Clan Chisholm* was guilty of negligence after her collision with the *Koursk*, so that the collision with the *Itria* could not be attributed to the preceding negligence of the *Koursk*, the Court of Appeal took the same view as Hill J. Their Lordships then proceeded to hear arguments on the question of law.

C. R. Dunlop K.C. and *Dumas* for the appellants. On the facts found, the collision between the *Clan Chisholm* and the *Itria* was the direct and immediate consequence of the collision between the *Koursk* and the *Clan Chisholm*, and that collision was caused by the joint negligence of the *Koursk* and the *Clan Chisholm*. Both ships were participating in navigation that was negligent towards the *Itria*, and it was their combined negligence and not their separate acts of negligence which brought the *Clan Chisholm* into collision with the *Koursk* and the *Itria*. The damage sustained by the *Itria*, therefore, was caused by two joint tortfeasors; and if two persons commit a joint tort the rule of common law is that judgment against one is, without satisfaction, a bar

to an action against the other: *King* v. *Hoare* (1); *Buckland* v. *Johnson* (2); *Brinsmead* v. *Harrison* (3); *London Association for Protection of Trade* v. *Greenlands, Ld.* (4) A joint tort is a tort committed by two or more persons for which they are jointly and severally liable. Where the tort consists of doing an act which infringes a legal right and is actionable without actual damage, it is a joint tort if the act is done by two or more persons in concert or by one of them at the instigation or with the authority of the other. But where the tort consists of doing actual damage and not an act wrongful and actionable per se, it is a joint tort if the damage was done by two or more wrongdoers or was the result of the combined effect of their respective acts. A person whose property has been destroyed owing to the negligent conduct of two persons has suffered a single wrong whether the two negligent persons committed the same or different acts of negligence.

There are a series of Admiralty decisions in which damage to an innocent ship caused by separate acts of negligence on the part of two other ships has been treated or held to be a joint tort. In *The Bernina* (5), in which actions were brought in respect of loss of life of persons on board one of two ships through a collision for which both ships were to blame, it is evident from the observations of Lindley L.J. that he was of opinion that if A. without fault of his own was injured by the negligence of B. and C., the latter were joint tortfeasors to whom at common law the doctrine of no contribution inter se would apply. In *The Avon and Thomas Joliffe* (6), where the plaintiff was the owner of an innocent ship damaged by a collision caused by the negligence of a tug and of the ship in tow of her, Butt J. said that the damage was caused "by the joint negligence of two individuals," and therefore the common law rule applied, that the plaintiff was entitled to judgment for the whole of his damage against the owner of the tug and not merely for a moiety. In *The Englishman*

(1) (1844) 13 M. & W. 494, 504.
(2) (1854) 15 C. B. 145.
(3) (1872) L. R. 7 C. P. 547.
(4) [1916] 2 A. C. 15.
(5) (1887) 12 P. D. 58, 89.
(6) [1891] P. 7.

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and The Australia (1), where tug and tow and the plaintiff's ship were all held to blame, Bruce J. held that the tug and tow were joint tortfeasors, and that the rule as to no contribution between joint tortfeasors prevented the owners of the tow, who had paid the plaintiff, from receiving any contribution from the tug. In *The Frankland* (2) an innocent ship *A.* was run into by ship *B.* in consequence of a collision between ships *B.* and *C.* Jeune P. said that *B.* and *C.* were joint wrongdoers, and then proceeded to deal with the question whether the application of the common law rule as to no contribution was excluded by the decree of both to blame as between *B.* and *C.* and he decided that it was. The argument and the judgment would have been unnecessary if the damage to *A.* had been a separate tort of *B.* and not a joint tort of *B.* and *C.* In *The W. H. No.* 1 *and the Knight-Errant* (3) a barge in tow of a tug sank a lightship, and Lord Mersey held the tug to blame for not porting and the barge to blame for not keeping in the wake of the tug, but he expressly treated them as joint tortfeasors. Similarly in *The Devonshire* (4) the acts of negligence were separate, but Lord Atkinson (whose judgment Lord Halsbury said he had read and that he entirely concurred with it) said that the case was one where an innocent vessel was brought into collision and sunk by the joint negligence of the tug which towed her and of the steamship with which she collided, and the question for decision was whether the plaintiffs were entitled to recover the full amount of the damages against "each of the joint tortfeasors." It is true that in all these cases the question now in dispute did not arise, but it is unlikely that the various judges mentioned were inaccurate in using the word "joint" in relation to the negligence of ships *B.* and *C.* which had caused damage to *A.*

In *Bullock* v. *London General Omnibus Co.* (5), where the acts of negligence were separate and independent, the question was argued, but not decided, as to whether the plaintiffs'

(1) [1895] P. 212.
(2) [1901] P. 161.
(3) [1910] P. 199.
(4) [1912] A. C. 634, 649.
(5) [1907] 1 K. B. 264.

cause of action was a joint tort or a separate tort of each defendant, and not therefore joinable in one action. But in *In re Beck* (1) Swinfen Eady L.J. said that in *Bullock's Case* the allegation in the statement of claim that the plaintiff's injury was caused by the negligence of both defendants was an allegation of "a joint tort." *Sadler* v. *Great Western Ry. Co.* (2) and *Thompson* v. *London County Council* (3), relied on by Hill J., do not conflict with the contention that the damage to the *Itria* was a joint tort. In the former case the statement of claim alleged two separate and distinct causes of action, which at that date, according to the decision in *Smurthwaite* v. *Hannay* (4), could not be joined in one action. If the statement of claim had been confined to an allegation of damage caused by the defendants jointly there would have been no misjoinder. The decision in *Thompson* v. *London County Council* (3), also a case of misjoinder, was explained in *Frankenburg* v. *Great Horseless Carriage Co.* (5) by Romer L.J. as merely an illustration of the rule that if *A.* is uncertain whether *B.* or *C.* has committed the damage, *A.* cannot sue both *B.* and *C.* in one action for the purpose of recovering from one of them only by claiming against them jointly, and add an alternative plea that the damage was caused by either one or the other separately.

The reason for the rule that a judgment against one joint tortfeasor is, though unsatisfied, a bar to a subsequent action against the other appears to be that the cause of action "transit in rem judicatam." On the same principle a release of one joint wrongdoer has the same effect as a judgment: *Salford Corporation* v. *Lever.* (6) As was said in *O'Keeffe* v. *Walsh* (7) "cause of action" means the substantial subject matter or grievance on which the action is founded and not the technical cause of action: see also *Phillips* v. *Berryman* (8) and *Goldrei, Foucard & Son* v. *Sinclair.* (9) In an action for damage by negligence it is the doing of the damage which is the wrong:

(1) (1918) 118 L. T. 629.
(2) [1896] A. C. 450.
(3) [1899] 1 Q. B. 840.
(4) [1894] A. C. 494.
(5) [1900] 1 Q. B. 504, 512.
(6) [1891] 1 Q. B. 168, 177.
(7) [1903] 2 I. R. 681, 718.
(8) (1783) 3 Doug. 286.
(9) [1918] 1 K. B. 180, 189.

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Ratcliffe v. *Evans*. (1) The judgment obtained against the owners of the *Clan Chisholm* was for precisely the same subject matter as the subsequent judgment obtained against the owner of the *Koursk*. There was one damnum and one injuria—namely, the sinking of the *Itria* due to joint negligence. In *Martin* v. *Kennedy* (2) Lord Eldon said the test by which it could be ascertained whether recovery of judgment in one action was a bar to another action was "whether the same evidence would support both the actions." Applying that test, the action against the *Koursk* was tried on the same evidence as the previous action against the *Clan Chisholm*.

[*Brunsden* v. *Humphrey* (3); *Darley Main Colliery Co.* v. *Mitchell* (4); *Hoare* v. *Niblett* (5); *Morris* v. *Robinson* (6); and *Day* v. *Porter* (7) were also referred to.]

The respondents elected to take a judgment against the owners of the *Clan Chisholm* for the whole of their damage, and thereby released the owners of the *Koursk*. In the statement of claim in their action against the *Clan Chisholm* the respondents alleged that the collision was solely caused by the negligent navigation of the *Clan Chisholm*. After the defence of the *Clan Chisholm* was delivered, in which it was alleged that the collision was solely caused by the negligence of the *Koursk*, the respondents issued their writ against the *Koursk*, to which an unconditional appearance was entered. The respondents could have proceeded with the action against the *Koursk*, and on obtaining judgment could have enforced it when the *Koursk* became free of requisition. It was not until after they had exhausted the limitation fund of the *Clan Chisholm*, to which the owners of the *Koursk* are alleged to be liable to contribute two-thirds, that the respondents proceeded with their action against the *Koursk*. The judgment therefore condemning the *Koursk* in the whole of the *Itria's* damage ought not to stand.

(1) [1892] 2 Q. B. 524, 528.
(2) (1800) 2 Bos. & P. 69.
(3) (1884) 14 Q. B. D. 141.
(4) (1886) 11 App. Cas. 127.
(5) [1891] 1 Q. B. 781.
(6) (1824) 3 B. & C. 196.
(7) (1838) 2 M. & Rob. 151.

Stephens K.C. and *L. F. C. Darby* for the respondents. There was no election on the part of the respondents. They prosecuted the action against the *Koursk* as soon as she became a free ship. The respondents took judgment against the owners of the *Clan Chisholm* on the claim made against them and against them only, a separate and distinct cause of action: cf. *Goldrei, Foucard & Son* v. *Sinclair*. (1) A joint tort is one in which the injuria and the damnum are the same. Damnum per se is not actionable, nor is injuria (except in a few special cases), unless there is also damnum. In the present case there were two separate and distinct injurias. The tort was the injuria, although not actionable unless damnum followed; but the cause of action is the injuria and not the damnum: see the judgment of Collins L.J. in *Thompson* v. *London County Council*. (2) In *Brunsden* v. *Humphrey* (3) Bowen L.J. quoting De Grey C.J. in *Hitchin* v. *Campbell* (4) said that the great criterion of identity "is that the same evidence will maintain both actions." Applying that test it is clear that the torts were separate. As against the *Koursk* the respondents had to prove that she ported; as against the *Clan Chisholm* they had to prove that she did not reverse her engines. Entirely different facts and allegations of negligence had to be pleaded in each case. It is true that Lord Mersey in *The W. H. No.* 1 *and The Knight Errant* (5), and Lord Atkinson in *The Devonshire* (6) used the phrase "joint tortfeasors" in reference to defendants guilty of separate acts of negligence, but in each case it was a wholly unnecessary use of the phrase; "tortfeasors" would have been equally appropriate. As regards *The Englishman and The Australia* (7) and *The Avon and Thomas Joliffe* (8), they were both cases of negligent navigation on the part of vessels in tow and the vessels towing them, and in each case tug and tow committed one and the same act of negligence. Further, they were both master

(1) [1918] 1 K. B. 180.
(2) [1899] 1 Q. B. 840, 844.
(3) 14 Q. B. D. 141, 147.
(4) (1771) 2 W. Bl. 827.
(5) [1910] P. 199.
(6) [1912] A. C. 634, 657.
(7) [1895] P. 212.
(8) [1891] P. 7.

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and servant cases in which the doctrine of vicarious responsibility would arise. These cases, therefore, have no bearing on the present question. If the doctrine contended for by the appellants is sound it should have been taken in *The Morgengry and The Blackcock.* (1)

[Reference was also made to *The Drumlanrig.* (2)]

Assuming there was only one tort, the common law rule as to joint tortfeasors does not apply, and never has been applied, in the Admiralty Court, where, by reason of the rule as to limitation of liability, in most cases an innocent plaintiff cannot recover the whole of his loss. In all the common law cases the plaintiff could recover in full.

Dunlop K.C. in reply referred to Pollock's Law of Torts, 12th ed., p. 473.

Cur. adv. vult.

Feb. 22. The following judgments were read :—

BANKES L.J. The question for decision in this appeal is whether a judgment recovered by the respondents against the owners of the steamship *Clan Chisholm* is a bar to the present action brought by the respondents against the appellants. [His Lordship stated the facts.] There is no doubt, and Hill J. so found, that the combined negligence of those in charge of the *Clan Chisholm* and the *Koursk* had the effect of bringing about the collision of the *Clan Chisholm* with the *Itria.* The question is raised whether the rule originally laid down in *Broome* v. *Wooton* (3), approved in *King* v. *Hoare* (4), and accepted in *Brinsmead* v. *Harrison* (5), applies to the facts of this case. The rule shortly stated by Willes J. in the last mentioned case is this : "If two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause." It is curious to notice the different reasons given by different judges for the rule. It is unnecessary to discuss them, as the rule must be accepted.

(1) [1900] P. 1.
(2) [1911] A. C. 16.
(3) (1606) Yelv. 67.
(4) 13 M. & W. 494, 504.
(5) (1871) L. R. 6 C. P. 584, 586.

It is a curious fact also that, at any rate so far as my researches go, the question of what constitutes a "joint tort" or "the same cause" within the meaning of the rule has never been closely considered in any reported case. The test as to whether this rule applies or not has sometimes been said to be whether the cause of action against the two persons said to be joint tortfeasors is the same or different. With submission to those who have held that view I think that this cannot be considered an exhaustive test, as I can imagine cases in which as against two obvious joint tortfeasors it would be possible to frame two quite distinct causes of action in respect of the injury caused by the joint tort. As an instance I may take the case where A., B. and C. conspire to assault X. and A. and B. commit the assault. X. would have a cause of action for assault and battery against A. and B., and quite a separate cause of action against C. for the conspiracy if he elected to proceed against the joint tortfeasors separately. In *King* v. *Hoare* (1) Parke B. undoubtedly adopts the cause of action test where he says: "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'Transit in rem judicatam'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but *one cause of action*, whether it be against a single person or many. The judgment of a Court of record changes the nature of that cause of action, and prevents it being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two." The learned judge appears to me to be dealing with a case where there is only one possible cause of action, or substantially only one cause of action, as he

(1) 13 M. & W. 494, 504.

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speaks of the cause of action "being single." In such a case the test is no doubt an accurate one.

I can find no case in which the question has been closely considered, but I do find dicta which support both sides of the argument which has been addressed to this Court. There is no doubt that both in *The Devonshire* (1) Lord Atkinson, and in *The W. H. No.* 1 (2) the then President, spoke of what appear to be two separate torts producing one damage as joint torts and the authors as joint tortfeasors. The point now under discussion was not under consideration in either case, and I cannot regard these dicta as authoritative. It is no doubt quite common to speak of each of two separate tortfeasors as joint tortfeasors in the sense that where each has contributed to the injury complained of, each is liable for the whole of the damage done. In my opinion, the use of the expression under such circumstances is inaccurate and misleading. I find a dictum of Collins L.J. in *Thompson* v. *London County Council* (3) which supports this view. The question there was whether under the Practice Rules then existing it was permissible to join as defendants the water company and the London County Council whose separate acts of negligence acting in combination had caused injury to the plaintiff's property. A considerable interval had there elapsed between the first act of negligence and the second, but that does not, in my opinion, weaken what the Lord Justice says: "But an argument was presented to us which, it appears to me, was based upon a fallacy—that was that because the plaintiffs had claimed only one damage that therefore their cause of action was necessarily one also, however many persons they chose to put on the writ as bringing about that one damage. It seems to me that that is no test at all. The damage is one thing, and the injuria is another. What constitutes the cause of action is the injuria, the wrong done by a separate tortfeasor; and when we analyse this case (the facts are not in dispute) we find we are dealing with it upon the assumption that the two acts

(1) [1912] A. C. 634, 657. (2) [1910] P. 199, 204.
(3) [1899] 1 Q. B. 840, 844.

which were done, the one by the London County Council and the other by the New River Company, are entirely disconnected torts—each of them a separate injuria—if it be injuria at all—quite distinct one from the other. The one was done recently by the county council by excavation, and the other at a much earlier date by the water company allowing water from its mains to weaken the soil in front of the plaintiffs' property, and the joint result of those two independent torts has been that the plaintiffs' house has come down. The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities." The Lord Justice mentions the interval of time in support of his view, but not as the foundation of it.

It is easy to put instances the mere mention of which indicate that the law must require something more than the single damnum to convert two quite separate and distinct torts into a joint tort. For instance, A., who wishes to approach B.'s house in order to commit a burglary, trespasses on his land and crosses a brook by an already damaged bridge, which he seriously weakens by his weight. Next day C., wishing to approach the same house mistaking it for that of a friend, trespasses on B.'s land, and in crossing the same bridge breaks it completely down by his weight. Can it possibly be said that the damage to the bridge was caused by a joint tort, or that A. and C. are joint tortfeasors ? I think not; and if this view is correct it follows that in order to constitute a joint tort there must be some connection between the act of the one alleged tortfeasor and that of the other. It would be unwise to attempt to define the necessary amount of connection. Each case must depend upon its own circumstances. The learned authors of Clerk and Lindsell on Torts, 7th ed., p. 59, say this: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design," and they cite a dictum of Tindal C.J. in *Petrie* v. *Lamont* (1) in support of their

(1) (1842) Car. & M. 93, 96.

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statement. Later they say "there must be concerted actions towards a common end." I am not sure that the rule is here stated sufficiently widely to cover every possible case, though it clearly supports the general conclusion as to the law which I have already indicated. Applying the rule thus explained to the facts of the present case it seems to me clear that the judgment of Hill J. was right. The negligence of those in charge of the *Koursk* was in not keeping station and running into the *Clan Chisholm*. This negligence clearly contributed to the loss of the *Itria*, as the learned judge has found that after the collision with the *Koursk* the *Clan Chisholm* could not have avoided the collision with the *Itria*. The negligence of the *Clan Chisholm*, as found by the learned judge, and the House of Lords, consisted in not stopping and reversing after she hard-a-ported. This negligence contributed both to the collision with the *Koursk* and to the consequent collision with the *Itria*. The damnum no doubt is only one and the act of negligence of each contributed to that damnum, but the acts of negligence are still, in my opinion, separate. There is no possible connection between them. They began, they continued, and they ended as separate acts, and they never became a joint act.

On the question of fact as to whether the *Clan Chisholm* could after the collision with the *Koursk* have avoided the collision with the *Itria*, I agree with the view taken by the learned judge that she could not. For these reasons the appeal, in my opinion, fails, and must be dismissed with costs.

It is not necessary in the present case to say anything on a point which may hereafter have to be seriously considered as to how far a defendant in such an action as the present may be entitled to credit for anything recovered from a contributing tortfeasor; nor have I referred to the rule in Admiralty as to the division of damages where the vessels of both plaintiff and defendant are to blame, nor to the application of Order XVI., r. 1, which permits the joinder of claims by persons in whom a right to relief is alleged to exist in respect of or arising out of the same transaction whether

jointly, severally or in the alternative. None of these questions are material to the present appeal, but with regard to the last I will merely indicate that, in my opinion, the ordinary case of a claim against both owners of two separate vehicles, which are alleged to have contributed to the damage in a running-down case, is more correctly dealt with as a claim against them severally or in the alternative than as a claim against them jointly.

SCRUTTON L.J. A collision between the steamships *Clan Chisholm* and *Koursk* has been held by the House of Lords to be caused by the negligence of each ship, in the proportion of two-thirds liability to the *Koursk*, and one-third to the *Clan Chisholm*. The negligence of the *Koursk* consisted in deviating from her convoy course into the track of the *Clan Chisholm*. The negligence of the *Clan Chisholm* consisted in not reversing her engines when she saw the *Koursk* out of her course. The two negligences were separate and independent, not taken in concert, or as part of a common plan, and both, in the view of the House of Lords, contributed to the collision. The question is then raised whether there was separate negligence of the *Clan Chisholm* after her collision with the *Koursk*, so that her subsequent collision with the *Itria* could not be attributed to the preceding negligence of the *Koursk*. The *Itria* had got judgment against the *Clan Chisholm* on this second collision on the ground of her original negligence, and in that action it was immaterial to decide whether the *Clan Chisholm* was guilty of any subsequent negligence. In the action between the *Clan Chisholm* and the *Koursk* Hill J. did decide that there was no negligence of the *Clan Chisholm* subsequent to the first collision, and this brought the damage to the *Itria*, so far as that damage was paid by the *Clan Chisholm*, into the damage to be apportioned between the *Clan Chisholm* and the *Koursk*. The *Itria* got judgment against the *Clan Chisholm* for the whole of the damage, but the *Clan Chisholm's* limitation of liability would prevent the *Itria* from recovering a great part of her damage against the *Clan Chisholm*. The

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Itria therefore proceeded against the *Koursk*, as soon as she ceased to be a requisitioned ship, to recover some part of the remainder of her damage.

The *Koursk* took two points in answer. (1.) That the *Clan Chisholm* was negligent after the first collision, so that her collision with the *Itria* was not the result of the *Koursk's* negligence before the first collision. Though this point had been decided against the *Koursk* in the *Clan Chisholm's* action by Hill J. and was not challenged in the House of Lords, it could be raised again in the action by the *Itria*, who was not a party to the first action by the *Clan Chisholm* against the *Koursk*. Hill J., on the advice of his assessors, repeated the previous finding of no subsequent negligence against the *Clan Chisholm*, and this Court, with the concurrence of its assessors, upheld his decision. The first defence of the *Koursk* against the *Itria* therefore failed.

The second defence was more formidable. It was that the *Koursk* and *Clan Chisholm* were "joint tortfeasors," and that the *Itria* by taking judgment against the *Clan Chisholm* had lost her remedy against the *Koursk* for the "joint tort."

I consider separately the position at common law and in Admiralty, because undoubtedly the fact that whereas, at common law contributory negligence bars the claim of either party, in Admiralty it results in a liability of either party for half the damages suffered by the other, may produce different results: see *The Frankland*. (1)

The common law rule both in contract and tort is stated by Parke B. in *King* v. *Hoare*. (2) [His Lordship read the passage set out in the judgment of Bankes L.J.] When in *Kendall* v. *Hamilton* (3) the House of Lords had to consider whether there was in cases of contract any equitable power to relieve against the common law rule, and held there was not, both Lord Penzance who dissented and Lord Blackburn who agreed put the rule on the same ground. Lord Penzance said: "When that which was originally only a right of action

(1) [1901] P. 161; 9 Asp. M. L. C. 196. (2) 13 M. & W. 494, 504.
(3) (1879) 4 App. Cas. 504, 526, 542.

has been advanced into a judgment of a Court of Record, the judgment is a bar to an action brought on the original cause of action." Lord Blackburn said: "But *King* v. *Hoare* (1) proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract." This Court in *Parr* v. *Snell* (2) has held that while the Judicature rules have destroyed the effect of the rule in certain classes of cases, it is still in force in claims for unliquidated damages and judgments thereon.

The substantial question in the present case is: What is meant by "joint tortfeasors"? and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors": The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another.

Counsel for the *Koursk* argued at first that if the physical damage was the same all persons who contributed to it without lawful excuse were joint tortfeasors. This would cover the case of two ships which by quite independent action and separate negligence ran into a third ship, one on the starboard and one on the port side, whereby she sank; of two persons uttering independently separate and distinct slanders concerning a servant, whereby his master dismissed him; of two separate excavators who by independent excavations

(1) 13 M. & W. 494. (2) [1923] 1 K. B. 1.

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brought down the house of a third party. But in none of these cases would the cause of action be the same. Lord Esher in *Cooke* v. *Gill* (1) and *Read* v. *Brown* (2) defined "cause of action" as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court." Now in the cases put, to succeed against one tortfeasor it would not be necessary to prove the negligence of the other tortfeasor. In the cases of master and servant, principal and agent, and concerted action, after proving the wrongful act of one tortfeasor, causing damage, it would only be necessary to add to the same tort, injuria plus damnum, the nexus of responsibility for that tort, of agency, employment or concerted action. But the same damage does not mean the same tort, and therefore does not mean the same cause of action.

Counsel for the appellants then suggested an emended definition, "a joint tort is a tort for which two or more persons are jointly and severally liable to the injured person." This seems directed rather to the remedy for the tort than to the nature of the tort itself, and to say that a joint tort is one for which persons are jointly liable only leads to the inquiry: For what torts are persons jointly liable? The answer is: For a tort (damage plus injuria) which they both commit or are responsible for the commission of, but not for a tort where such is responsible for a different injuria and the two injuria happen to produce the same damnum.

I am of opinion that the definition in Clerk and Lindsell on Torts, 7th ed., p. 59, is much nearer the correct view: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design" . . . . "but mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action to a common end." Still more so when there is not even similarity of design, but independent negligences accidentally resulting in one damage. This is the view of Sir John Salmond: "Persons are not joint wrongdoers simply because

(1) (1873) L. R. 8 C. P. 107. (2) (1888) 22 Q. B. D. 128, 131.

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their independent acts have been the cause of the same wrongful damage" : Salmond on Torts, 5th ed., pp. 84–5. I myself should put "wrongful" before "acts" instead of before "damage." I think it is also the view of Collins L.J. in *Thompson* v. *London County Council* (1) : The "fallacy that . . . . because the plaintiffs had claimed only one damage, that therefore their cause of action was necessarily one also. . . . . What constitutes the cause of action is the injuria, the wrong done by a separate tortfeasor." To make the tort, you want a wrongful act causing damage ; and to make the tort the same cause of action, both elements must be the same. Thus in *Brunsden* v. *Humphrey* (2), where the negligence was the same, but one damage was to the person and one to the property, a judgment for one cause of action, wrongful injury to property, was no bar to a second cause of action, trespass to the person. If this is so where the same negligence causes different kinds of damage, still more is it so where different and independent wrongful acts cause the same damage ; there are two causes of action, and a judgment on one does not bar the other.

The judgment below in effect takes the same view as to the meaning of "joint tortfeasors." In the present case the *Koursk* was guilty of negligence in proceeding out of course across the line of its convoy ; the *Clan Chisholm* was guilty of quite independent negligence in not reversing when the action of the *Koursk* was observed. These two separate and independent negligences resulted in a collision, the direct consequence of which was a collision with the *Itria*. In my view, the *Koursk* and the *Clan Chisholm* were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts, and therefore at common law judgment against one in respect of the cause of action against it would not be an answer to a claim against the other in respect of the different cause of action on which it was sued.

It is true that in various cases to which we were referred eminent judges have used the phrase "joint tortfeasors" in respect of separate acts of negligence. This was always

(1) [1899] 1 Q. B. 840, 844. (2) 14 Q. B. D. 141.

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obiter and in regard to a matter immaterial to the decision. If there is no contribution between joint tortfeasors, there is of course no contribution between independent tortfeasors, and the phrase "no contribution between joint tortfeasors" is equally true if read "no contribution between tortfeasors." Lord Atkinson in *The Devonshire* (1) uses the phrase "joint tortfeasors" about persons guilty of independent acts of negligence where "tortfeasors" would be equally accurate as far as the consequence of several liability for all the damage, the matter then being discussed, was concerned; indeed, he uses the phrase "tortfeasors" in the same sentence. I am quite unable to regard these casual and irrelevant inaccuracies as amounting to a determination of principle.

In Admiralty, the result is at least the same. For it has been decided that one of two ships, which by separate acts of negligence damages a third, can bring the damage it has to pay the third into the calculation of half damages following on the judgment "both to blame": *The Frankland.* (2) The *Clan Chisholm* can apparently therefore bring into her claim against the *Koursk* the damages she has paid to the *Itria.* Further, the owners of innocent cargo on a ship in collision caused by its own negligence and that of the other ship can only recover half their damage against either ship: *The Drumlanrig.* (3) And it would seem to follow that a judgment against one tortfeasing ship for one-half cannot be a bar to a claim for the other half against the other tortfeasor. In the present case, owing to limitation of liability, the *Itria* will not recover her whole damage, unless she can sue both the *Clan Chisholm* and the *Koursk,* perhaps not even then. It seems clear that persons who are not joint tortfeasors at common law are not joint tortfeasors in Admiralty; indeed, in the latter Court they are in a better position as to contribution.

In my view, the appeal should be dismissed with costs.

SARGANT L.J. [after setting out the facts and the two defences of the *Koursk,* and saying that as regards the appeal

(1) [1912] A. C. 634, 649. (2) [1901] P. 161.
(3) [1911] A. C. 16.

on the ground of an alleged intervening act of negligence on the part of the *Clan Chisholm* after the collision with the *Koursk*, he agreed that the judgment appealed from was unquestionably right, his Lordship continued :] As regards the second defence Hill J. took time to consider his judgment, and ultimately decided that though there was but one damage, it was caused by two separate acts of negligence, that there were therefore two separate torts and not one joint tort, and accordingly that the *Itria* was still entitled to recover against the *Koursk*. It is with respect to this second part of the learned judge's judgment that the main argument has taken place before us and that the real difficulty arises.

The definition of joint tortfeasors in Clerk and Lindsell on Torts, 7th ed., pp. 59, 60, is as follows : " Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. 'All persons in trespass who aid or counsel, direct, or join, are joint trespassers.' If one person employs another to commit a tort on his behalf, the principal and the agent are joint tortfeasors, and recovery of judgment against the principal is a bar to an action against the agent. But mere similarity of design on the part of independent actors, causing independent damage, is not enough ; there must be concerted action towards a common end." And the discussion in Salmond on Torts, 5th ed., p. 84, is to much the same effect. Stress is laid there on the feature that there must be responsibility for the same action, the imputation by the law of the commission of the same wrongful act to two or more persons at once. The examples given are under three heads : agency, vicarious liability and common action.

It would appear, therefore, if these definitions are correct, that in order to constitute joint tortfeasance in the strict sense of the word (and apart from certain expressions in *The Frankland* (1) and *The Devonshire* (2) hereinafter mentioned we have not been referred to any less strict definition) there must be a concurrence in the act or acts causing damage,

(1) [1901] P. 161 (2) [1912] A. C. 634.

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not merely a coincidence of separate acts which by their conjoined effect cause damage. And this view is strongly supported by a passage in the opinion of Lord Bramwell in *The Bernina*. (1) He there says: "But take the case put in argument of injury, not to a passenger but to one of the public by separate acts of negligence in two persons, which acts conjoined caused the injury. . . . . Such a case it is not easy to imagine, but let us suppose it. I should say an action might be maintained against the two jointly. If their conduct was wilful, it clearly might be, and I do not know why its being negligent should make a difference." It seems to me that Lord Bramwell obviously considered that in the case supposed the two persons guilty of separate negligence were not joint tortfeasors. If they had been they would ipso facto have been liable jointly, and it would have been wholly unnecessary to go through the process of reasoning employed.

The case supposed by Lord Bramwell in the above passage is precisely similar to the present case and also to *The Bernina* (1), when once that case was simplified by the very important decision that a passenger on one of two colliding vessels was not in any way identified with the vessel by which he was travelling, but was in the same position as one of the general public, or as the *Itria* in the present case; and it may therefore be useful to refer to some passages in the judgments in *The Bernina* (2) to ascertain the precise legal position of two persons who by the combined effect of separate acts of negligence cause damage to a third person. Lord Esher said: "If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer." Lindley L.J. said, speaking of the decision in *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (3): "But if the proximate cause was the combined

(1) (1888) 13 App. Cas. 1, 14. (2) 12 P. D. 58, 61, 93.
(3) (1875) L. R. 10 Ex. 47.

negligence of the two companies, I confess my inability to understand upon what principle the plaintiff could be held not entitled to sue either company; or in other words, to be without a remedy." And Lord Herschell said (1): "If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, 'I am not guilty, because but for the negligence of another person the accident would not have happened.'"

These passages seem to me merely to lay down the principle that in such cases as these, the damage resulting from the combination of two negligences must not be regarded as too remote in an action against either wrongdoer, provided that the negligence of that wrongdoer was a proximate, though partial, cause of the accident: and see Beven on Negligence, 3rd ed., vol. i., p. 77. They seem to me inconsistent with the theory that the combination of the two negligences constitutes a joint tort. And they get rid of the difficulty which I felt during the progress of the present appeal in accepting Mr. Stephens' contention that different facts would have to be established in the actions brought by the *Itria* against the *Clan Chisholm* and the *Koursk* respectively. It seems to me that in the first action the *Itria* would have to prove only negligence on the part of the *Clan Chisholm*, proximately, though it may be only partly, causing the accident; and in the second action the *Itria* would have to prove only negligence on the part of the *Koursk*, proximately, though it may be only partly, causing the accident. It would be for the defendant vessel in either action, if thought fit, to raise the defence that the negligence of the defendant alone and apart from the contributory negligence of the third vessel would not have caused the accident. And this contention would not, on the principles above stated, avail the defendant, and in any case would be a defence only and not a part of the cause of action that would have to be established by the plaintiff.

It seems to me therefore that the *Itria* had two separate

(1) 13 App. Cas. 1, 9.

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and distinct causes of action, the one against the *Clan Chisholm* and the other against the *Koursk*, though the resulting damage was the same in both cases.

As regards the language in four Admiralty cases which have been referred to—namely, *The Avon and Thomas Joliffe* (1); *The Englishman and The Australia* (2); *The Devonshire* (3); and *The Frankland* (4)—the first two present no difficulty. In each of these cases the operation was a joint one conducted under a single ultimate direction, and the requirements of the strict definition of joint tortfeasance were satisfied. In the third and fourth cases the circumstances were different, the negligent vessels were under separate direction, and were guilty of separate negligences; and so far as legal cause of action was concerned their position was strictly analogous to that of the *Clan Chisholm* and the *Koursk* here. And in the third case both Lord Mersey and Lord Atkinson, and in the fourth case Sir Francis Jeune, speak of the two negligent vessels as joint tortfeasors. Accordingly, these judgments form some authority for treating two separate negligences with one resulting damage as constituting a joint tort, if the phrase "joint tortfeasors" is to be treated as used there in its strict and technical sense. But when these cases are carefully examined there is no need for putting so strict a meaning on the phrase. The liability established in those cases was in no way dependent on the tort being joint, but might have resulted equally from separate negligences combining indeed to produce one damage, but forming, on the principle above stated, separate causes of action. The difference was quite immaterial for the purpose of the decision and no argument seems to have been addressed to it. I cannot attach to the use of the phrase "joint tortfeasors" in these cases any real importance for the present purpose.

It follows, therefore, that the judgment of the learned judge was right and that his decision should be affirmed. I am relieved to think that the result cannot follow here that the *Itria* should recover from the *Clan Chisholm* and the

(1) [1891] P. 7.
(2) [1895] P. 212.
(3) [1912] A. C. 634.
(4) [1901] P. 161.

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Koursk together more than the total damage done her; but this may perhaps be so in other cases. I regret that the Admiralty rule as to apportionment of damage applies only to that sustained by the two vessels who collide through their own negligence; and further, that in cases like this of damage by two acts of mere negligence, the Courts have not worked out some equitable system of contribution such as was effected by the Court of Chancery in the case of persons liable to one common debt or duty and as gave rise to the principles of general average: see Spence's Equitable Jurisdiction of the Court of Chancery, vol. i., pp. 661–663.

Appeal dismissed.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondents: *Waltons & Co.*

E. C. M. T.

[IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION AND IN THE COURT OF APPEAL.]

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Divorce—Practice—Costs—Abortive Trial—Right of Wife to stay Proceedings in second Trial until Costs of the abortive Trial are paid.

A wife, respondent to a petition for divorce upon which the jury have disagreed, is entitled to have proceedings in a second trial stayed until her costs of the abortive trial are paid. But she may waive this right by causing her husband to change his position. She does not however waive it if, on her application to dismiss the petition for want of prosecution, she accepts an order for securing the payment of the costs of a second trial without mention of the unpaid costs of the abortive trial.

Decision of Duke P. reversed.

ADJOURNED SUMMONS.

In this case a husband filed a petition on July 19, 1921, for divorce on the ground of his wife's adultery. The wife denied the adultery and charged her husband with cruelty. The husband was ordered to pay, and paid after some delay, his wife's costs up to the setting down of the case. On

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April 6, 1922, the husband was ordered to give security for the wife's costs of the hearing by paying 25*l.* into Court or giving a bond for 50*l.* This sum had been fixed on the assumption that neither party was in a position to retain leading counsel. The case was set down for hearing before Horridge J. and a common jury for Tuesday, July 18, 1922. On Saturday, July 15, the wife's solicitors for the first time discovered that the husband had retained leading counsel for the hearing, and retained leading counsel for the wife. On this same day they took out a summons for an increase of the amount of security for costs, which had not in fact been given. The registrar could not give an appointment for this summons until 3 P.M. on July 18, when the petition was heard. The matter was mentioned to the judge when the case came on; but he said he could not deal with the summons then; that if he gave the respondent costs up to the amount of the security she could increase that amount. He would leave it open to the registrar to deal with.

The case then came on for hearing and was continued on the 19th and 20th, when the jury failed to agree and were discharged; and an order was made that the husband should pay the wife's costs of the hearing, not exceeding the amount ordered to be paid into Court or secured, together with such further sum as would, in the opinion of the taxing registrar, have been allowed had the duration of the trial been known at the date of the order. The wife's costs were taxed at 183*l.* 8*s.* 11*d.* The petitioner had not paid any part of these costs, and no application had been made to enforce payment or to stay proceedings till they were paid.

On November 3, 1922, the petitioner again set down the case for trial. The wife's costs of the first trial had not been paid, and on November 21 two orders were made: (1.) that these costs should be paid; (2.) that the petitioner should lodge 50*l.* in Court or give a bond for 100*l.* for the wife's costs of the second trial, and ordering a stay of proceedings till the order (2.) was complied with. Up to this time no attempt had been made to enforce the order of July, 1922, for payment of the wife's costs, and no stay of proceedings

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had been applied for in respect of these costs. The cause was not at this time brought on, and no further application was made by either party until June 1, 1923, when the respondent and co-respondent applied by summons to dismiss the petition for want of prosecution. The registrar then made a peremptory order that the petitioner should give a bond to secure his wife's costs of the second hearing. This was done, and the case was restored to the list for hearing on July 30, 1923.

On October 2 the respondent took out this summons asking that all proceedings should be stayed till the petitioner had paid his wife's costs of the first hearing. This summons was adjourned into Court.

T. Bucknill for the respondent. The wife is entitled to have all her costs paid, not only those for which security was given: *Kemp-Welch* v. *Kemp-Welch and Crymes* (1); *Sanders* v. *Sanders* (2); *Robertson* v. *Robertson.* (3)

Acton Pile for the petitioner. In June, 1923, the respondent applied to have the petition dismissed for want of prosecution, and on that application an order was made, which in effect allowed the petitioner to proceed upon his securing the costs of the new hearing. She cannot now go back to the former position.

[He was stopped by the Court.]

THE PRESIDENT (SIR HENRY DUKE). This is one of those difficult cases arising from the present rule of the Court, which is almost an absolute one, that a husband must find the amount of his wife's costs unless she happens to have a separate estate. It is too late to criticise that rule. It has been laid down in numerous cases, of which *Kemp-Welch* v. *Kemp-Welch and Crymes* (1); *Sanders* v. *Sanders* (2) and *Robertson* v. *Robertson* (3) are instances. In *Sanders* v. *Sanders* (2), moreover, the Court of Appeal decided that the wife has an option to claim a stay of proceedings till

(1) [1910] P. 233. (2) [1911] P. 101.
(3) (1881) 6 P. D. 119.

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such time as the husband shall have provided for her costs; and that if a first trial of the issue between them prove abortive, there shall be no second trial till security is given. The result is sometimes almost oppressive. However, one must not apply the rule any the less strictly because the original rules of this Court have lately been reconsidered; and the question must be determined also by reference to principles which apply to all litigation.

The contention for the husband is that in November, 1922, the wife was in a position which entitled her to move for a stay on the ground that her costs of the first trial had not been paid, and that she nevertheless elected to disregard her rights and to proceed to a second trial of the issue as if there had been no abortive trial. It is said that thereby the husband is released from his liability to pay, before he goes to a new trial, the costs of the first trial which have been taxed and which have been ordered to be paid and a certificate for which has been issued fixing the date for payment.

There has been issued, at the instance of the respondent wife, in addition to the order as to the costs of the first trial, an order whereby the suit is stayed till the wife's costs of a second hearing have been provided for. That order produced an effective stay of proceedings; and on it application was made in June, 1923, on behalf of the respondent and co-respondent, to dismiss the petition for want of compliance with it. However, on that application an order was made for security for the wife's costs of a second hearing, and that has been complied with. And, thereupon, as all parties must be taken to have known, the petitioner, having complied with this new order, became entitled to set the cause down for trial again.

In that state of the case, in October, 1923, the respondent for the first time applied for a stay of proceedings by reason of non-compliance with the order for the payment of the wife's costs of the first hearing, made on November 21, 1922, at the same time as the original order for security for the costs of the second hearing.

In my opinion the respondent has, by the course followed

by her, elected to proceed to a second trial merely on obtaining security for her costs of it, and not relying upon her right to stay till payment of her costs of the original trial. The respondent has for many months treated the case as one she desired to have tried and disposed of and has induced the petitioner to change his position by omitting to press him for the costs of the first trial and obtaining payment into Court of the estimated costs of a new trial. She cannot now claim to have the suit still stayed till the former costs have been paid.

No order. Leave to appeal.

J. R. B.

The respondent appealed. The appeal was heard on January 14, 1924.

Merriman K.C. and *T. Bucknill* for the appellant. The learned President was wrong in holding that the wife by electing to proceed to a second trial has waived her right to have the proceedings stayed until her costs of the abortive trial have been paid. That that is her right is shown by *Kemp-Welch* v. *Kemp-Welch and Crymes* (1); *Sanders* v. *Sanders* (2); and *Robertson* v. *Robertson.* (3)

Acton Pile for the petitioner. In November, 1922, the wife was entitled to apply for a stay on the ground that her costs of the first trial had not been paid.

She elected to waive that right and to go on with the second trial, and she accepted the order of November 21, whereby the petitioner was ordered to give security for the wife's costs of the second trial, and proceedings were stayed until that order was complied with. She cannot now go back to her former position.

The rule is set out in *Davis* v. *Davis* (4), which is reported in a note to *Wilson* v. *Wilson.* (5) But that case shows that where the foundation of the rule—namely, the presumption that the husband has everything and the wife nothing—is

(1) [1910] P. 233.
(2) [1911] P. 101.
(3) 6 P. D. 119.
(4) (1789) 2 Hagg. Cons. 204n.
(5) (1797) 2 Hagg. Cons. 203.

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taken away, the rule will fail, and not be applied. In *Otway* v. *Otway* (1), which was not cited in *Kemp-Welch* v. *Kemp-Welch and Crymes* (2), the point was mentioned as to how far the old rule with regard to the wife's costs would apply in the case of a woman married after the Married Women's Property Act, 1882.

[WARRINGTON L.J. That Act does not, surely, abrogate the rule?]

The view of the President as to *Otway* v. *Otway* (3) is shown in *Betton-Bright* v. *Betton-Bright*. (4)

The question is whether the wife has an absolute right. She is entitled to apply, but it is submitted the Court has a discretion. *Keane* v. *Keane* (5) was relied on in *Kemp-Welch* v. *Kemp-Welch and Crymes* (2), but it has no bearing on the present case.

[He also referred to *Palmer* v. *Palmer*. (6)]

The Court ought not to exercise its discretion in a case where to stay the proceedings would be a denial of justice.

[POLLOCK M.R. The learned President has not dealt with the matter as an exercise of discretion, but on the footing of an election by the wife.]

Cur. adv. vult.

Jan. 21. POLLOCK M.R. [after stating the facts:] That being the position, on October 2 a summons was taken out by the wife that all further proceedings be stayed on the ground that the petitioner had failed to comply with the order of November 21 for the payment of her taxed costs of the first trial—namely, 183*l.* 8*s.* 11*d.* That order she would be entitled to in the ordinary course under the cases which have been decided, unless some different order were made, and on December 3 the learned President made no order upon that application that further proceedings should be stayed, holding, as I understand, that the effect of the application to dismiss the action taken out on June 1 was an election on the

(1) (1888) 13 P. D. 141, 155.
(2) [1910] P. 233.
(3) 13 P. D. 141.
(4) [1920] P. 338, 342.
(5) (1873) L. R. 3 P. & M. 52.
(6) [1914] P. 116.

part of the wife that she would rely upon that application and any order made upon it in preference to relying upon her right which she had under the established practice of the Court to have the proceedings stayed until the costs of the first trial which the husband was ordered to pay should be paid. The learned judge came to the conclusion, for the reasons which he gives in his judgment on December 3, that there ought not to be a stay, and it is from that refusal to make any order that this appeal is brought.

The learned President in his judgment states the rule which I have referred to quite clearly. He refers to three cases: *Robertson* v. *Robertson* (1); *Kemp-Welch* v. *Kemp-Welch and Crymes* (2); and *Sanders* v. *Sanders* (3); and says that those cases make it clear that it is at the option of the wife, who is a respondent, to claim that the proceedings in the suit shall be stayed until her costs have been provided for, and if there has been an abortive trial a second trial shall not proceed until the costs of the first trial have been taxed and paid. That is the right of the wife. It is clear therefore that the learned judge was quite mindful of the practice of his Court, as one would expect, and that he intended to follow the three cases to which he refers and the principle which they laid down. But he finds this a difficult case, and because of its particular circumstances he refuses to make an order. Thus, he sets aside the avowed and explicit right of the wife that there should be a stay until payment of the costs of the first trial has been made. Let it be also observed if authority is wanted that in *Waudby* v. *Waudby* (4) it is stated that the wife is entitled to be paid the costs of both trials where there has been a first and abortive trial, with the consequence that there has to be a second trial. So that the right of the wife to have a stay not only in respect of the costs of the first but also the costs, or rather the provision for the costs, of the second trial, appears clear. Then the learned judge says that regard must be had to the general principles which cover all litigation; and he comes to the conclusion that applying

(1) 6 P. D. 119.
(2) [1910] P. 233.
(3) [1911] P. 101.
(4) [1902] P. 85.

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those general principles he can find an election on the part of the wife to abandon her right to have a stay until the costs of the first trial have been paid, and it was on those grounds that he refused to make any order.

Upon this question I differ from the learned judge. The question may be put in this way: Did the wife elect to disregard her right to stay the second trial of the case after the first trial had proved abortive and proceed to have this suit determined as though there had been no abortive trial? For the reasons I am about to give I am of opinion that such an election cannot be attributed to the conduct of the wife in taking out a summons to dismiss, as she did, on June 1, 1923. I am not differing from the learned judge on any question relating to the general practice and rules of the Divorce Court as to costs, nor am I attempting to lay down any rule of general application; I am dealing, as the learned judge did, with a case which he found difficult, and with the question whether in the circumstances, particular and perhaps peculiar to this case, there has been an election by the wife, which, upon the general principles applicable to all litigation, show that in this case no order ought to be made upon the wife's application to stay.

I find myself in some difficulty as to how the learned judge thought that the mere issuing of a summons to dismiss would indicate an election on the part of the wife to abandon her other rights. But on looking back at the authorities I found the case of *La Grange* v. *McAndrew* (1), which was not referred to in the Court below. It is true that case was decided in the Queen's Bench Division, and the practice of the other Divisions of the Court have perhaps a limited application to the procedure of the Divorce Court, but the practice of other Divisions is sometimes taken as a guide for the Divorce Division. The reason why I refer to *La Grange* v. *McAndrew* (1) is that there the plaintiff was ordered to give security for costs and the action was stayed in the meantime, but he failed to give that security. Then the defendant applied to dismiss the action for want of prosecution, and it

(1) (1879) 4 Q. B. D. 210.

was argued, in accordance with what, I think, must have been in the learned judge's mind, that it was a well-established practice that the defendant could not be allowed to sign judgment for the purpose of dismissing the action as long as the order for security for costs remained in force, because if he wished to force the plaintiff on or to sign judgment against him, he must abandon the order for security for costs. But it was pointed out that the practice and principles adopted in Courts of equity were different, and there was always a discretion to dismiss an appeal if the plaintiff did not proceed in a reasonable time, and the defendant ought not to be subjected to the alternative of having the action hanging over him indefinitely, or of giving up his security for costs; and the Court in that case came to the conclusion that the principle to be followed was the equity practice, and not to refuse the order to dismiss on the terms that if an application to dismiss is made there must be an abandonment of the right to security. Therefore in that case the order to dismiss was made, although the defendant had not abandoned the order for security for costs. I think the principle the learned judge adopted in this case must be derived from the practice which was suggested in the argument in that case, but was not then followed, and has not been since followed. Whether that was in the learned judge's mind or not, at any rate it is a useful case, as showing that the application to dismiss is not necessarily inconsistent with, nor does it sufficiently indicate, a definite election on the part of the applicant to abandon any other rights accruing to him or to her. It seems a little difficult to say that, because the respondent, the wife, wished to have the matter brought to a conclusion and was unwilling to allow a suit to hang over her head for an indefinite time, and was applying, therefore, to get some sort of conclusion, she was intending to abandon all her other rights.

I did not refer, as perhaps I ought to have done, to letters which passed in November, 1922. The petitioner's solicitors then gave notice that they had set the case down for trial and the respondent's solicitors on November 6 replied:

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"Until the Respondent's costs of the said hearing have been paid and security given for future costs the Respondent is entitled to have the hearing stayed." Those letters, at any rate, show that neither the wife nor her advisers ever intended to abandon or to make such an election, as the learned judge suggests. Inasmuch as I think the wife was entitled to take what steps she could to have the matter brought to a conclusion and that that did not necessarily involve an election on her part to abandon her other rights, I have formed the opinion that in the particular circumstances of this case there is no ground for saying that there has been an abandonment by the wife of her rights, and that the decision of the learned judge was wrong. The appeal therefore must be allowed and the order made upon the application of the wife.

I only add that the learned judge evidently did not intend, nor does this Court intend, to depart from the established practice or from the decisions to which our attention has been called.

WARRINGTON L.J. This is an appeal from an order of the learned President refusing an application by the respondent that further proceedings on the petition be stayed on the ground that the petitioner has not paid the costs of the respondent of an abortive hearing. The President refused the order asked for on the ground that by her conduct the respondent had waived the remedy for which he held, as I think rightly, she would otherwise have been entitled. I agree with the learned President that it is a rule of the Divorce Division, and the repeated decisions of the Court of Appeal, first of all in *Robertson* v. *Robertson* (1), and later in *Kemp-Welch* v. *Kemp-Welch and Crymes* (2) and *Sanders* v. *Sanders* (3), make it clear that it is at the option of the wife, who is made a respondent by her husband to a petition for dissolution of the marriage, to claim that proceedings in the suit shall be stayed until her costs have been provided for, and if there

(1) 6 P. D. 119. (2) [1910] P. 233.
(3) [1911] P. 101.

has been an abortive trial that the second trial shall not proceed until the costs of the first trial have been paid. That is the right of the wife. If any authority were wanted for that proposition it is found in the judgments of each of the Lords Justices in *Kemp-Welch* v. *Kemp-Welch and Crymes* (1), and I particularly refer in that connection to the judgment of Kennedy L.J. It is not a matter of discretion; the discretion which the Court has is over the costs themselves; but when once the costs have been ordered to be paid and it is a question of staying further proceedings until those costs have been paid, that is the right of the wife; but that right may be lost just as any other right of a litigant may be lost by proceedings which the Court holds amount to an election not to insist on that right, and to have brought about by that election a course of action on the part of the other side upon the assumption that the strict rights would not be insisted upon. The reasons for the learned judge's judgment are thus summed up. He says that the respondent has all the ordinary remedies of a litigant in respect of these costs, but having treated the case as one which she desired to have prosecuted to trial during several months and having induced the petitioner to take up a position different from his previous position by means of that pressure, the respondent cannot now, when she has obtained the advantage of immediate proceedings, turn round upon the petitioner and say: "I claim still to have this suit stayed until you pay the costs of the first hearing." Now did the respondent in this case do anything which showed that she desired to have the case tried again or which could be said to have brought pressure upon the petitioner directed to that object, or to have induced the petitioner to take up the position he did on the footing that the case would be tried again without any further objection on the part of the wife? I have already referred to the two orders of November 21. The second of those two orders, which ordered security for costs of the further trial, was, as I have said, made purely as a matter of course, and not on any definite application by the respondent,

(1) [1910] P. 233.

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and it must be borne in mind that at the time when it was made the petitioner's solicitors had already been warned of the consequences which might ensue from the non-payment of the costs of the first trial. The petitioner denied it. More than six months elapsed, and on June 1 the wife took out a summons, not merely to stay proceedings until the costs of the first trial had been met, but to have the proceedings dismissed for want of prosecution. That she was entitled to do, but as so often happens when applications to dismiss for want of prosecution are made, on a representation by the plaintiff or the petitioner that he really wants to go on, a further opportunity is given. Accordingly the registrar before whom that application came did give the petitioner a further opportunity of giving the security under the order of November 21. He gave him twenty-one days. The petitioner complied with that order by completing the security on the last of the twenty-one days, and ten days after that it became competent for the petitioner to put the case in the list unless, under the order of November 21, the Court otherwise ordered. He gave notice that the cause would be placed in the list, and I think it was dated July 27. That was not ten days after the 18th. Anyway, it was too late then to do anything before the Long Vacation. The respondent was informed of the position by the official of the Courts, and at the first opportunity after the Vacation she issued the present summons.

With all respect to the learned judge, I really cannot see what there is in the conduct which I have mentioned on the part of the respondent which misled the petitioner and induced him to believe that the application of October 2 was one which would not be made. Such an application would not have been necessary if the cause had been dismissed for want of prosecution, and it was unnecessary for the whole of the period between the expiration of seven days from the service of the order of November 21 until July 18. It seems to me that the respondent had a right under the practice of the Court to have the proper order made in consequence of the non-payment of the costs of the first trial, and with all respect

to the learned President, on the facts of this case she has done nothing which would amount to a binding election on her part.

SARGANT L.J. I agree that this appeal should be allowed. The wife had after the abortive trial a clear right to have the balance of her taxed costs paid before a new trial was ordered. She had also an equally clear right to have provision made for the costs of the new trial. Prima facie she was entitled to have both these rights satisfied by the husband as conditions precedent to his obtaining an effective order for a new trial.

The wife on November 21, 1922, obtained an order enforcing the second condition precedent—namely, the provision for the costs of the new trial—and the learned President has held that she has thereby, or by subsequently taking out a summons to dismiss, abandoned her right to enforce the first condition precedent. I cannot agree with this view. It is clear that the husband was not in any way misled. The wife's solicitor by a letter of November 6 pointed out most clearly and definitely that the wife relied upon her rights with regard to the costs of the new trial, and on her rights with regard to the costs of the first trial. And during the long interval while the husband was in default in complying with the order with regard to the costs of the second trial, and the wife was protected by the existing order against the possibility of a new trial, it might have been held oppressive on her part to have obtained a second order to stay the new trial until the costs of the first trial had been paid. I cannot see anything in her conduct sufficient to amount to a waiver or an abandonment of any right in respect of the costs of the first trial. Much was said by counsel for the petitioner about the hardship on the husband, who is only just above the pecuniary limit which would allow him to sue as a poor person. But if he can find funds for himself for two trials, he cannot escape the obligation of placing his wife in an equally favourable position. In a case where a jury has once disagreed, it

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would be specially unfortunate that a wife should be placed in a position of inferiority to the husband as regards legal aid.

Solicitors for the appellant: *Churchill, Clapham & Co.*
Solicitors for the petitioner: *Mills, Lockyer, Church & Evill.*

G. A. S.

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[IN THE COURT OF APPEAL.]

B. *v.* B.

Divorce—Child of Marriage—Custody—Access of guilty Wife—Jurisdiction.

The statement in *Stark* v. *Stark* [1910] P. 190, 193, that adultery by the wife ought not to be regarded for all time and under all circumstances as sufficient to disentitle her to access to or even to the custody of her daughter, who is under sixteen, confirmed.

In dealing with such matters the Court will have regard to the particular circumstances of each case, always bearing in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse.

Where a mother, guilty of adultery, had been divorced, and the custody of the only child of the marriage, a girl of eleven years of age, was given to the father, limited access to her daughter was given to the mother, the Court being of opinion that in the circumstances of the particular case such an order was for the benefit and interest of the infant.

Decision of Duke P. reversed.

APPEAL from the decision of the President (Sir Henry Duke) refusing the application of a divorced mother for access to the only child of the marriage, a girl eleven years old. The custody of the child had been given by Horridge J., who tried the petition for divorce, to the petitioner, the husband. The President had entirely refused access. His reasons for so deciding and the facts of the case appear sufficiently from the judgments of the Court of Appeal.

Hughes K.C. and *Noel Middleton* for the appellant.
Sir E. Hume Williams K.C. and *Bucknill* for the petitioner.

Jan. 29. POLLOCK M.R. This is an appeal from an order made by the learned President, who has refused to

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allow the respondent in this suit to have access to the child of the marriage.

The petitioner and the respondent were married on October 5, 1909. On May 2, 1912, a female child was born; that child will be twelve years old next May. The parties apparently lived happily together until some little time before 1922. Difficulties then arose, and on July 7, 1922, the two spouses separated and the home was broken up. The wife took the child away with her and she remained in her mother's care. Immediately after the parties had separated, and the wife had gone away taking the child, then some ten years old, a letter was written on behalf of the petitioner offering to pay a sum of 3*l*. a week for the maintenance of the respondent and the child, and that letter written by the petitioner's solicitor contains these important words: "Our client is only willing to pay this sum provided you take the entire responsibility for the maintenance and education of the child." It is important to observe, however, that within a week of the time when the final and fatal decision to separate had been taken the offer was made by the petitioner to provide for his wife and child, but on the terms that the whole responsibility for the maintenance and education of the child should rest upon the respondent. The respondent obtained employment at E. and sent the child to a good school in the place. On December 14, 1922, the petitioner took the child away from the school and placed her with his brother, who is the head master of a school for boys and girls, and seems to be in every way qualified to make a home for the little girl. The child was left in the charge of him and his wife, and has remained there ever since. During the period from December, 1922, to February, 1923, certain incidents occurred and certain letters were written. They were acts which took place under considerable provocation, perhaps on both sides, but undoubtedly the wife took some steps which led to the belief that she was trying to recapture the child. At the same time it must not be forgotten that the husband had taken the child out of the custody of the wife, although in the previous July he had made an

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arrangement whereby the child should be left in her custody, with the understanding that she was to provide for her maintenance and education. I regard those letters as both indiscreet and unwise in the interests of the child. They seem to attempt to foster something like a spirit of discontent in the mind of the child and they are certainly not the letters which one would expect a mother to write if she were wholly minded to safeguard the interests of her child. But too much importance must not be attached to them, for there is some evidence that the mother at the time she wrote them knew that they would not reach her child but would be opened by somebody else; but the letters are to be deprecated.

A petition was lodged on February 12, 1923, and on April 17 an order pendente lite was made for the mother to have access to her child for two hours once a week. At the time when that order was made the facts that took place and the letters that had been written in December, 1922, and January and February, 1923, were all past history, and if and so far as they incline the scale against the mother having any access at all to the child, they were available at the time when the order of April 17 was made for the mother to have access. I state that very clearly, because in weighing the effect of the letters and the acts done at the present time I take definite note of the fact that in spite of them an order was made for the mother to have access. It is true it was made pendente lite, and the order that we have to discuss is one of a more serious nature, because it is in the nature of a final order, laying down the course which is to be followed after the unhappy events which took place later. On July 27 the petition was heard by Horridge J. It was not defended. The parties had agreed that the damages to be recovered against the co-respondent should be the sum of 600*l*. Horridge J. came to the conclusion that it was a very bad case on the part of the co-respondent, and he enlarged the damages to the sum of 1000*l*. That must have been on the ground that he considered the co-respondent as having been the cause of breaking up a happy

home; and shows the gravity attached to the action of the co-respondent by the learned judge. But at that time the custody of the child was given to the husband and access by the mother to her child was to be allowed once in the following week and twice in the course of September, those terms being embodied in the order, and also that the mother was not to be accompanied by the co-respondent.

On November 5 application was made for access. The learned President, after hearing the summons on two occasions and adjourning it into Court, delivered his judgment on December 10, by which he refused access, but accepted an undertaking that information should be given to the mother if the child was suffering from serious illness, the obvious purpose of that being that on such an occasion it should be possible for the mother to see her child if there was any danger to her life, or if she was so seriously ill as to render it necessary for the mother to be at her bed-side. That condition was imposed by the learned President as a condition attaching to the order which he made refusing all other access to the mother, and it is from that refusal of access to the mother that this appeal is now brought before us.

I need hardly say that this case is to us, as it was to the President, one of inherent difficulty. If it depended simply upon the exercise of discretion by the learned President we should be very reluctant indeed to overrule that exercise; but, of course, his discretion must be exercised in accordance with certain definite rules and principles which are binding not only upon his Court but upon this Court, and the reason why I am prepared to interfere with the order which he has made is, that although I think he has not been unmindful of the rules and principles of law, and has certainly considered the conduct of the parties, he has, not in the exercise of his discretion, but in the application of the rules and principles to the facts, come to a conclusion which I do not think is warranted.

As to the law, it is clear from *Clout* v. *Clout* (1) and *Bent* v. *Bent* (2) that the old principle on which the Ecclesiastical

(1) (1861) 2 Sw. & Tr. 391. (2) (1861) 2 Sw. & Tr. 392.

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Court acted was that the Court would not order access to the children of the marriage to a mother who had been found guilty of adultery. But in 1875 the matter was discussed on an appeal from a Scottish Court in the case of a judicial separation on the ground of the husband's adultery. In *Symington* v. *Symington* (1) the judges had to consider what was the principle which should be followed in these cases. Lord Cairns says this (the Scottish Act being in pari materia with the English Act): "It appears to me that the Act of Parliament has given the Court the widest and the most general discretion, and has purposely done so; and I think it must be the duty of the Court to consider all the circumstances of the particular case before it—the circumstances of the misconduct which leads to a separation no doubt—the circumstances of the general character of the father—the circumstances of the general character of the mother—and, above all, it should be the duty of the Court to look to the interest of the children." He says there ought to be an opportunity of access on both sides, so that none of the children may grow up without as full knowledge and as full intercourse as the case would admit of both parents. It is impossible to fail to observe that the spirit, and indeed the words of *Symington* v. *Symington* (1), are different from the cold and bare rule laid down in *Clout* v. *Clout* (2) and *Bent* v. *Bent*. (3) Nor does the flexibility or movement of the law stop there. In *Handley* v. *Handley* (4) we have a clear declaration by the Court of Appeal that where the wife has been guilty of adultery the Court is not precluded from making an order giving the divorced wife access, although it goes on, "but as a general rule such an order will not be made." Lindley L.J. there said that the judge will be mainly guided by the particular circumstances of the case before him, and also he will be guided by the interests of the children. It is true that *Symington* v. *Symington* (1) was cited to the Court, but it looks to me as if the full effect of that case had hardly been

(1) (1875) L. R. 2 H. L. Sc. 415, 420.
(2) 2 Sw. & Tr. 391.
(3) 2 Sw. & Tr. 392.
(4) [1891] P. 124.

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appreciated at the time when *Handley* v. *Handley* (1) was decided. Then after *Handley* v. *Handley* (1) we have the case of *In re A. and B.* (*Infants*). (2) The decision there dealt with the Guardianship of Infants Act, 1886, and in particular with s. 5. It is said that the decisions under that Act are entirely segregated to the Chancery Division and that the Divorce Division takes no notice of that Act. Perhaps that is putting the argument too high; I will put it in this way, that the Guardianship of Infants Act is not as binding upon the Divorce Division as it would be on the Chancery Division. I am not satisfied as to that, because, having regard to what Gorell Barnes J. said in *Giles* v. *Giles* (3), without stopping to inquire how far the Divorce Division may be bound to exercise the powers of the Act, I think, as he points out, that the Divorce Division would accept guidance from the other Divisions in order to bring the decisions of all the Divisions into accord one with another; and Lindley L.J. in *In re A. and B.* (*Infants*) (4) again points out that the Guardianship of Infants Act had created another milestone on the road, that it extended the rights of mothers, and that it was essentially a mothers' Act. That case having been decided in 1897 we come, thirteen years later, to *Stark* v. *Stark* (5), a decision of the Court of Appeal. It is clearly laid down by the Court that a guilty mother is not to be disentitled to access to her daughter or even to the custody of her, assuming her to be under the age of sixteen. The decision of the Court is thus expressed: "We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter"; and they finally say: "It is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse." Therefore we approach the principle in this way: first of

(1) [1891] P. 124.
(2) [1897] 1 Ch. 786.
(3) [1900] P. 17.
(4) [1897] 1 Ch. 790.
(5) [1910] P. 190, 193.

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all, the wife is no longer to be regarded as subject to a rule that under no circumstances is she to have access. She has now by virtue of the decisions and the legislation been placed in a very different position, and we are not to regard her as not capable of being given access to her child; but above all we must consider the paramount interests of the child. I therefore look at this case from that point of view. I cannot think that it would be right from the point of view of the child to cut her off from all access to her mother. The relation of mother and daughter ought not to be, as the Courts have now decided it need not be, entirely severed. It may be an advantage to the daughter within proper limits, and if she is not brought into contact with what I might call the corroding side of the mother's life, still to have the sympathy and the affection, and, let me hope, the guidance of her mother. Although her mother has fallen she remains her mother. Under these circumstances, therefore, I think that in the interests of the child it would be right to allow the mother to have access to her daughter. The decisions say that that is to be or can be allowed, subject to proper safeguards. The learned President has, I know, purported to follow, and indeed taken note of *Stark* v. *Stark* (1); but I have some difficulty in satisfying myself that he has not fallen into some confusion in the observations that he makes in his judgment. He says, for instance: "Various arguments have been addressed to me with much force in support of the application of the respondent that, now paying, as she must, the penalty for her past misconduct, she should be treated as a mother having the natural rights of a mother to a voice in the future of her child and some influence in the up-bringing of the child." Then he comes to the conclusion that, in view of what had happened, there was a danger of some contradictory influence being brought into the child's life, an influence which would certainly not be beneficial to her; and yet he goes on to say that at what might be even a supreme moment in the life of the child, in the case of serious illness, at a time when it might be most necessary to

(1) [1910] P. 190.

keep the child free from disturbing or exciting interviews and a time when her nerves might be on the rack, the mother was to be informed, and not to be prevented from seeing the child. I cannot follow the logic or indeed the principle of such an order. From what I have said it will be gathered that the matters which are referred to by the President as to the wife exerting herself by ingenious correspondence to affect the life of the child, and so on, bulk in my mind to a very such smaller extent than they did in the mind of the President. For the reasons I have given, I think they were dictated by unwise, imprudent and possibly somewhat angry motives, but they are not really the preponderating facts to which attention should be paid. One has to look at the whole case, and having regard to the fact that on two occasions an order has been made for access after these events, namely in April and again in July, 1923, I think an order ought now to be made that the mother should have access. The question is: what access? Can the mother be relied upon to carry out any undertakings and adhere to the rules that have been laid down? There is ground for saying that the mother might not adhere strictly to them, but after the careful hearing of the case in this Court, I cannot but think that if the privilege and the opportunity of seeing her daughter is granted to the mother she will be more careful than she has been in the past to exercise wisdom and discretion, and to adhere to any undertaking given as to access. I think an order ought to be made—an interim order for access, not a final order, but one that can be varied or modified as occasion may require. It would be going too far to make an immediate order that the child might stay with the mother. That is a matter, perhaps, for which leave may be given hereafter if this access proves to be of advantage to the child. Of course the access will have to be under circumstances which preclude any contact with the co-respondent or his family. But these details are difficult, and Warrington L.J. has undertaken to draw up an order which will embody the terms which this Court, in granting the access, thinks ought

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to be imposed upon the mother. For the reasons which I have given I have come to the conclusion that upon the facts and the law a mistake has been made by the learned President, and while I do not think I am laying down any new rule of law or attempting to do so, I am applying the law to facts which appeared to him to be somewhat different from what they do to us at present. For these reasons I think the appeal must be allowed, and a new order made, the terms of which will ultimately be embodied in the order after the details have been settled by Warrington L.J.

Warrington L.J. I am of the same opinion. The application which was dealt with by the learned President was an application asking for an order that the respondent, the mother of the child in question, might have access to her during week-ends in the school term, and that the said child might spend half of her holidays with the respondent at her grandparents' house at a place named. On that application the learned President refused to make any order at all, and it is from that refusal the present appeal is brought.

So far as the law is concerned, I do not propose to go again through the earlier cases on the subject which have been referred to by the Master of the Rolls. I think the existing law is quite accurately summed up in the judgment of the Court of Appeal in *Stark* v. *Stark* (1), which was evidently meant to be a pronouncement intended to guide the Courts in the future. It is in these terms (2): "We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to the custody of her daughter, assuming her to be under sixteen. The Court ought not to lay down a hard and fast rule on this subject. The statutory power conferred upon the Court ought, in the language of Lopes L.J. in *Thomasset* v. *Thomasset* (3), 'to be exercised discretionally according to the particular circumstances in

(1) [1910] P. 190. (2) [1910] P. 193.
(3) [1894] P. 295, 307.

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each case in which its interference is invoked.' And it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration and not the punishment of the guilty spouse. The fact that change of custody or liberty of access may unsettle the mind of the infant is only a circumstance to be considered, and ought not to be regarded as a complete bar to any change or new order for access." I will proceed, then, to deal with the matter on the lines there laid down. The matter is one in the discretion of the judge before whom it comes, in this case the learned President; but it is a discretion which is capable of being reviewed in this Court, although, in accordance with the universal practice, this Court does not lightly interfere with the exercise by the judge in the Court below of the discretion vested in him. Before the Court interferes it ought to find some substantial reason for taking a contrary view. In this case I think there are substantial reasons for taking a contrary view to that which the learned President took when he rejected the application altogether. I think, upon reading his judgment, it is clear that he has given undue importance to certain incidents which were deposed to in evidence, and I think on the other hand he has not given sufficient attention to the possibility of making an order on the wife's application less extensive than that which she asked for, and yet one which would be in the real interests of the child. To deal with the first of these points, the incidents to which I think he has attached undue importance are those which occurred in December, 1922, and February, 1923. It was subsequent to both those incidents that two orders of the Court had been made for the access of the mother to the child, the first in April, 1923, and the second the temporary order embodied in the decree nisi. Those incidents may well be exaggerated, to some extent, in the evidence which was given on behalf of the husband. My experience in such cases certainly teaches me that such incidents usually are exaggerated in the evidence, for this reason, that one does not know all the surrounding circumstances. We cannot know them all. The deponents who deal with them give special importance

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to certain particular happenings, and do not give importance to other surrounding circumstances or other incidents which might deprive the first of a great deal of the effect which at first sight they seem to have. Not only that, but even assuming it to be true that the wife did give way to a certain amount of excitement and do that which in cooler moments she would not have thought of doing on those two occasions, I will not say she had justification for a moment, but there were other facts which to a large extent would explain her attitude at that time, especially when in December, 1922, the more violent of the two incidents occurred, only two days after the husband had summarily put an end to her custody of the child, which he had previously allowed her to retain, by taking the child away from the school where she had placed her. The other incident to which the learned President appears to attach considerable importance is with regard to the letters which the applicant wrote to her child during the year 1923. All of those letters were certainly indiscreet, and I am quite sure that the result in the present case of her having written such letters as those will be a lesson to her in the future, and that she will carefully abstain from repeating either by writing or by word of mouth what she did then. But there is this to be said in her favour, and it does not seem to have occurred to the learned President, that the two letters about which most complaint could be made were written at a time when she had the best of reasons for supposing that they would not reach the child at all, but that what was said in them would, instead of reaching the child, reach the eyes of those to whom the remarks were more specially addressed. If that is so a great deal of the force which the learned President has attached to the writing of those letters is taken away from them. I think that is enough to say with regard to the first of the two grounds on which, in my opinion, the exercise by the learned President of his discretion might be held to have been based on a wrong footing. But there is another. I cannot help thinking that the learned President has regarded the application as one which would involve the partial custody by the mother of her

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child, and that he has not given his attention to the possibility of a milder form of access which, while not cutting the child off altogether from her mother, would not involve the consequences which the learned President seemed to fear. The passages in his judgment which lead me to that conclusion are very many. He says: The application of the wife is "frankly based upon the ground that to-day a mother who has been found guilty of adultery ought not to be regarded by the Court as being prima facie an unfit person to be concerned in the upbringing of a girl." Then, again, a few lines further down—this is the argument of the respondent: "she should be treated as a mother having the natural rights of a mother to a voice in the future of her child and some influence in the upbringing of the child." Then again, in referring to the arguments on the part of the father, he says this: "In the disadvantage in which the mother's conduct has placed the child, the best thing that can be done for her is to enable her, if possible, to pass away from the influence of this loss she has suffered, and to be brought up under the care of her father and those relatives of his who profess a real attachment for her." Then again: "Any efforts he can make will be at any rate in part frustrated if the influence of the mother is allowed to be constantly operative in the life of the child." Again: "What is sought to be done is to obtain the authority of this Court for the systematic association of the respondent in the suit with her child, whose custody the Court has given to the child's father." Then there is another which really seems to sum up what is in the President's mind when he says he must give effect to the father's objection "to the presence in the child's life of the kind of influence which it is desired to bring into the child's life," and he says that is a well-founded objection. Then again: "In my judgment, the forcible introduction of that influence into the life of the child would create, in this case, two hostile elements which would be always at work in the upbringing of the child." I think the learned President, as I have said, seemed to think that what he was asked to do was to make some order which would divide the authority

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which the Court has given to the father by entrusting him with the custody of the child—that it would divide that between him and his wife. But has he sufficiently considered whether it is really best in the interest of the infant to entirely cut her off from all association with her mother, to whom she is warmly attached, rather than to preserve, at all events, the knowledge of each other in the minds of both the mother and the child which could be effected if the mother were allowed from time to time to visit the child? What I think ought to be done, as the Master of the Rolls has said, is to make an order which in general terms would be something to the following effect, that until further order (as such orders always are expressed to be) the mother under certain circumstances and conditions, which will be specified in the order when drawn up, shall be at liberty to visit the child at the home where the child is, including liberty to take her out with her; but I think we ought not to go further than that by directing that the child should pay visits to the mother at the house in which the mother may be living. Of course, that will be subject to certain undertakings which, as I say, can be settled in detail, and for that purpose I propose to invite the solicitors for both the mother and the father to attend at my room at some time convenient to all of us, when the details of that order can be settled and I can hear such suggestions as may be made on either side.

Atkin L.J. I agree that this order should be discharged. Like the other members of the Court, I have felt considerable difficulty in dealing with the appeal, inasmuch as it essentially involves a review of the discretion exercised by the learned President. Any decision of his is, of course, commended to this Court with all the weight of his experience behind it, and, indeed, I think the Court would not be in the least inclined to review his discretion unless they were satisfied that they disagreed with him either on some view of the law taken by him, or in respect of some findings of fact upon which he has based his decision. But in this case, having considered the whole of the facts, I think there are materials

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upon which this Court is at liberty, and under the circumstances bound, to come to a different conclusion. There can be no doubt that the learned President has laid down for himself certain rules in coming to his conclusion. It is not very easy from his judgment precisely to formulate what those rules were, but the first thing he says is that the application was "frankly based upon the ground that to-day a mother who has been guilty of adultery ought not to be regarded by the Court as being prima facie an unfit person to be concerned in the upbringing of a girl." Nowhere in the course of his judgment does the learned President deal expressly with that argument, but inasmuch as he did not give effect to it I think it is reasonably plain that he thought the argument was ill-founded; and if so, I think it follows that he was of opinion that the converse of the argument is true—namely, that to-day a mother who has been found guilty of adultery ought to be regarded by the Court as being prima facie an unfit person to be concerned in the up-bringing of a girl. There are other passages in the judgment which also lead me to the conclusion that the learned President, in determining what was the right view to take, was guiding himself by this proposition, that he has to consider the rights of the father, and that it is for the father to whom the custody of the child has been entrusted by the order of the Court to determine what shall be the conditions under which the child shall exist, and that, unless it is proved to the satisfaction of the Court that an interference with those wishes of the father on behalf of the mother did in fact promote the interest of the child, the wishes of the father are to be given effect to. I need not refer to the passages in which he also says that the question which has to be considered is whether or not the objection of the father to the application of the mother is an unreasonable one. All those matters which lay down any kind of rule, or any kind of presumption, or any kind of prima facie proof, seem to me to be wrong in law. I think all these cases have to be approached with single reference to the interests of the child under the particular circumstances of the case, and for that reason I do not hesitate

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to say that the statement which was made in *Handley* v. *Handley* (1), in so far as it can be properly stated to be a rule of law, is no longer the rule to guide the Court. In that case Lindley L.J. says (2): "I do not say that the Court can in no case give to an adulteress access to her children; there might be circumstances under which it would think fit to do so, but they must be very exceptional circumstances." The learned reporter, in framing the headnote to that case, has said that what the Court laid down was that the Court is not precluded from making an order giving the divorced wife access, but as a general rule such an order will not be made. I do not find those words in the judgment, but that must be based on the words I have read.

Now, I agree with what has fallen from the other members of the Court, that the law in regard to this class of case has grown. I think that the true rule is the rule laid down in *Stark* v. *Stark* (3), which is, that there is no rule. The Court in a considered decision, a judgment of the whole Court, say this: [His Lordship read the passage quoted above and continued:] That being the law, notwithstanding the passage which was read from *Grafton* v. *Grafton* (4), a later decision of the Court of Appeal, in which *Stark* v. *Stark* (3) was not cited, I am satisfied that the principles laid down in *Stark* v. *Stark* (3) do represent the true rule, and if that is the position it seems to me impossible for the Court to guide itself by any kind of prima facie rule or any kind of presumption. The Court must have regard to all the circumstances of the case, and one of the circumstances of the case undoubtedly is that the mother will no longer have in fact the continued opportunity of seeing the child that she had when she was at the matrimonial home, and, secondly, that the mother has been guilty of a matrimonial offence. It is impossible to suggest that that is not a consideration which ought to be very seriously regarded in considering the welfare of the child. But every case must be decided upon its own merits, and it is impossible to say that there may not be

(1) [1891] P. 124.
(2) [1891] P. 128.
(3) [1910] P. 190.
(4) The Times, April 22, 1914.

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different considerations, based upon so many different factors that it is unnecessary and impossible to deal with them, such as the age and sex of the child, or the children, the circumstances which existed before there was a separation, and the circumstances which have existed after the separation, the means of the husband, and, as I have already said, the age, health and disposition of the child or children and of the mother.

In this particular case we are dealing with a delicate child of eleven years of age, an only girl, who obviously is very closely attached to the mother, and who, owing to the circumstances of the matrimonial home, has necessarily been throughout the whole of her childhood under the substantial and sole charge and nurture of the mother. Under those circumstances, it seems to me that it would be a very strange and unusual combination of circumstances that would make it to the interest of the child to be deprived at that age of all association with the mother. It means a cutting away from the child all the most tender associations that she has ever had in her life. Against that I would set a great deal of foolish conduct on the part of the mother in relation to her dealings with the child. I am not talking now of immorality, because I conceive that there would be sufficient protection against the child ever being brought into contact with immoral surroundings; but certainly if access were never to be allowed to children on the part of either father or mother, if the father or mother was not always and on all occasions perfectly discreet and wise, there are a great many parents who never would have the opportunity of seeing their children again, and to my mind the love and affection of a mother outweigh many foolish or indiscreet acts on the part of the parent in question.

The other matter upon which I think the learned President really based a good deal of his judgment was that the conduct of the mother in this case was a deliberate and wilful attempt to alienate from the child her love for her father, or her relations, or those people with whom she was living. I cannot myself attach any other meaning to the

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language used by the learned President. It is a little vague. I do not know whether it is intentionally vague in the interests of the mother, but the learned President begins by saying that he is satisfied that upon certain occasions the mother exerted herself by ingenious correspondence to affect the mind of the child with jealousy and dislike for those about her who had the lawful care of her; and then he says that those claims warrant the father in being doubtful whether the future of the child will be "beneficially affected by the compulsory introduction into her life from time to time of the kind of influence of which those acts to which I have referred were the index." By that I think he must mean the influence which affects the mind of the child with jealousy, dislike, and so on. Then later on he says he has come to the conclusion "that the father's objection to the presence in the child's life of the kind of influence which it is desired to bring into the child's life is a well-founded objection" and "the forcible introduction of that influence into the life of the child would create in this case two hostile elements which would be always at work in the up-bringing of the child." Then he says: "I cannot conceive anything more disastrous, if it were purposely done, in the provision and care and upbringing of a girl at the critical time of life at which this child is found." Of course, those words are capable of meaning this: "I think it would be bad for the child that the influence of a guilty mother should be brought into the up-bringing of that child." But in view of the language of the learned President I think on the whole that is not what he meant. I think what he meant was that the influence of the mother would be directed to exciting jealousy and dislike. Now that is a matter which is based upon findings of fact from the evidence that was put before the learned President. This is a case where we have had the same opportunity of forming an opinion upon that evidence as the learned President had. He did not hear the matrimonial suit itself, nor has he seen the parties in person. He has had the evidence on affidavit; that is precisely the same evidence that we have had, and all I can say is that I

think if he came to the conclusion that he ought to deprive the mother of access because he was satisfied that the mother's influence will be directed to exciting distrust and suspicion in the mind of the child, I think he went too far. I do not think the evidence warrants him in coming to that conclusion. There are circumstances which have been referred to by the other members of the Court, which, if they stood alone, would possibly admit of that construction; but I think a very strong fact is that after they had occurred, or some of them had occurred, and the learned registrar had made an order for access pendente lite, the letters which were chiefly complained of were written in May, and no application was made to vary the order for access. After the letters had been written, and after the whole of the circumstances which I think the learned President referred to had taken place, Horridge J. gave access for three or four occasions during the Long Vacation, until the present application could be made and heard. I prefer to regard this matter as an exercise of jurisdiction by the learned registrar and by the learned judge who tried the suit rather than as an exercise of discretion by the learned President. A very strong fact seems to me to be that in the subsequent letters these complaints are removed, and I see little or nothing to complain of in the expressions which have been criticized in those later letters. The result of this seems to me to be that it is our duty in the interests of the child to allow her from time to time, as I would prefer to put it, to have access to the mother, rather than to deal with it in the other way. I think it would be a mistake at the present moment, under the conditions we know of, to make any further order. It is obvious that such an order as has been stated by the other members of the Court is not necessarily to be permanent. It is a tentative order in this sense, that from it the Court will be able to decide what effect it will have upon the interests of the child, and if it is beneficial, or at any rate if it does no harm, it may very well be that application will be made for further access hereafter. What the position might be in any changed circumstances of the mother it is quite impossible

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for anybody to say at the moment. The right thing is to make an order for limited access, and I think the Court is fortunate in having that order finally settled by Warrington L.J. I agree therefore that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Peacock & Goddard, for Basil W. Edwards, Leicester.*

Solicitors for petitioner: *Collyer-Bristow & Co., for Ingram & Co., Leicester.*

G. A. S.

Applied. EVERITT *v.* EVERITT. [1949] 1 All E.R. 908.

C. A. 1923 *Dec.* 19. 1924 *Jan.* 18.

[IN THE COURT OF APPEAL.]

THOMAS *v.* THOMAS.

Judicial Separation—Cruelty of Husband—Desertion—Wife turned out of Home—Penitence of Husband—Request to return—Refusal of Wife—Continuing Desertion—Summary Jurisdiction (Married Women) Act, 1895 (58 *& 59 Vict. c.* 39), *s.* 4.

A husband who had been guilty of a long series of acts of insult and cruelty towards his wife, ultimately expelled her and some of her children from the matrimonial home. On the following day he apparently repented of his act and endeavoured to get his wife to return to him by repeatedly writing penitent letters to her promising to amend his future conduct towards her. She refused to comply, and, after some months, took out a summons against him for desertion under the Summary Jurisdiction (Married Women) Act, 1895. The justices found the desertion proved, and their decision was upheld by the Divisional Court. The husband appealed to the Court of Appeal on the ground that the desertion had been terminated by his repentance and desire for his wife's return:—

Held, that the desertion was a continuing offence and could not be obliterated by subsequent offers, as to the genuineness of which his wife might reasonably entertain doubts.

APPEAL from an order of the Divisional Court of the Probate, Divorce and Admiralty Division (Sir H. Duke P. and Hill J.), on appeal from an order of the Brynmawr justices under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39).

In the proceedings before the justices it was found that

the husband, Henry Thomas, had frequently ill-treated his wife. On June 16, 1922, he quarrelled with her, and ordered her to leave the home, and told her she might take two of their three children with her. On the following day he repented and begged her to return, but she refused. He then repeatedly wrote letters to her imploring her to return and promising unconditionally to amend his conduct towards her. She still refused, and ultimately she took out a summons for an order under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, alleging desertion against him. The summons was heard by the justices on December 5, 1922. They found desertion proved, and ordered the husband to pay 2*l.* a week to his wife. They further ordered that the wife should no longer be bound to cohabit with the husband, and gave her the custody of the three children of the marriage. The Divisional Court varied the order of the justices so far as it related to separation and the custody of the children, but confirmed it upon the question of desertion.

The husband appealed.

Montgomery K.C. and *B. A. Leverson* for the appellant. The question on this appeal is whether the desertion by the husband continues although he has done all in his power to induce his wife to return to him. The desertion must be existing at the time when the application under s. 4 of the Act is made to the justices. Desertion does not continue when the party causing it has done all that he can to put an end to it by unconditionally asking his wife to come back to him. To constitute desertion, although it is not actually necessary that the husband should drive his wife away from him, there must be an intention on his part to entirely break off matrimonial relations: *Charter* v. *Charter* (1); *Kay* v. *Kay* (2); *Timmins* v. *Timmins*. (3) If the request by the husband that the wife should come back is bona fide and unconditional there is no continuing offence of desertion. There must be intention to desert in order to constitute desertion: *Sickert* v.

(1) (1901) 84 L. T. 272. (2) (1912) 77 J. P. 128.
(3) [1919] P. 75.

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Sickert (1); *Ellis* v. *Ellis*. (2) Desertion may be put an end to by return to cohabitation. The test is whether the wife is a consenting party to the continuance of the desertion: *Cudlipp* v. *Cudlipp*. (3) A bona fide offer by the husband to return takes away the wife's right to proceed for relief on the ground of desertion: *Cargill* v. *Cargill*. (4) Desertion is not a specific act, but rather a course of conduct continuing over a considerable period: *Wilkinson* v. *Wilkinson*. (5) If the husband cannot put an end to the desertion it is obviously not a continuing offence. Here the husband's whole desire was that the wife should return. There was no reasonable evidence on which the justices could come to the conclusion at which they arrived.

Bayford K.C. and *Clifford Mortimer* for the respondent. A mere offer by the husband to take back his wife does not necessarily put an end to continuing desertion. All the facts must be considered in order to see if there is desertion. The test here is whether the husband could have got an order for restitution of conjugal rights. He plainly could not: *Russell* v. *Russell* (6); *Beer* v. *Beer* (7); *Gatehouse* v. *Gatehouse* (8); *Oldroyd* v. *Oldroyd*. (9) The husband's offer must be considered in connection with all the circumstances of the case: *Ellis* v. *Ellis*. (2) The justices came to a right conclusion, and they were supported by the Divisional Court.

Montgomery K.C. in reply. It has not been suggested that the husband's offer was not bona fide. There being a bona fide offer and desire to resume cohabitation the desertion was terminated, although it may be that the husband could not obtain a decree for restitution.

Cur. adv. vult.

1924. Jan. 18. The following written judgments were delivered:—

POLLOCK M.R. This was an appeal by Henry Thomas from an order made by the Divisional Court on May 29,

(1) [1899] P. 278.
(2) [1896] P. 251.
(3) (1858) 27 L. J. (P. & M.) 64.
(4) (1858) 1 Sw. & Tr. 235.
(5) (1894) 58 J. P. 415.
(6) [1895] P. 315.
(7) (1906) 94 L. T. 704.
(8) (1867) L. R. 1 P. & M. 331.
(9) [1896] P. 175, 183.

1923, whereby the Court in part confirmed, and in part varied, an order made by the justices for the Petty Sessional Division of Brynmawr upon a summons taken out under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, by Mary Ethel Thomas, the wife of the appellant, alleging desertion on the part of her husband on December 5, 1922. The summons was heard, and the justices, after hearing the evidence of the wife, the husband, and others, found desertion proved, and ordered that he should pay 2*l.* a week to his wife thenceforth. They further ordered that the wife should no longer be bound to cohabit with the husband, and gave her the custody of the three children of the marriage. The Divisional Court by their order varied the order of the justices so far as it related to separation and the custody of the children, but confirmed the order of the justices made upon the question of desertion. It is from that part of the order of the Divisional Court that this appeal is brought. The question before us is whether the Divisional Court were right in confirming the order of the justices on the issue of desertion.

It is argued on behalf of the husband that desertion is a continuing offence, and that inasmuch as, after they had parted in the manner hereinafter set out, the husband by subsequent acts endeavoured to get his wife to return to him, there could no longer be desertion on his part.

The parties were married in 1915. The husband served in the Great War, and after his demobilization in 1920, in February, 1921, he and his wife took a confectioner's business at Greenwich and lived together at the place of the business. The appellant was found by the justices guilty of cruelty to his wife, and his counsel admitted to this Court that he could not contend that there was not evidence before them sufficient to justify such a finding. Indeed the evidence was clear. The President has carefully stated the facts in his judgment and it is unnecessary to repeat them. The justices found the desertion proved on the material date—namely, December 5, 1922, the date on which the case was before them, after estimating the conduct of the appellant on the question of desertion, by reference to his cruelty and general

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conduct up to the time when he sent his wife away from him—namely, June 16, 1922, at which date the desertion began.

After that he attempted to get his wife to return to him by trying to see her and writing letters to her. These are relied upon, on his behalf, as acts of penitence inconsistent with, and terminating any intention to desert his wife. In my judgment, and for the reasons given by the President, the justices were right in considering the husband's conduct as a whole and in deciding that the wife's refusal to return to cohabitation was not without just cause.

In the present case the husband acted with deliberation and determination to part from his wife. His conduct previously may be looked at to see if his act on June 16 ought to be regarded merely as an act of angry impulse. He had from time to time been guilty of gross cruelty to his wife; but three months before he had told her to go, and by repeated acts of cruelty he had shown that he valued his wife's presence but little. Then on June 16 he tells her to leave him. He is remonstrated with by his father-in-law, but adheres to his course.

He adopts a plan whereby the children are divided between him and his wife. He retains the elder daughter deliberately. So the departure of his wife and the two children is insisted upon. The next day he attempts to see his wife, and perhaps not unexpectedly she refuses to meet him. On July 7 he sent her a telegram calculated to awaken a mother's fears, and falsely reproaching his wife with want of care for the daughter whom he had, of set purpose, kept in his own charge.

It is contended for the husband that his so-called repentance must be accepted as the outstanding feature of his conduct during some eight or nine months, even though he might not be entitled to an order for restitution of conjugal rights in accordance with the principles laid down in *Russell* v. *Russell* (1), as interpreted in *Oldroyd* v. *Oldroyd*. (2) Why so? It must be a question for those who have to decide upon the evidence before them what weight and emphasis is to be

(1) [1895] P. 315. (2) [1896] P. 175, 184.

given to and placed upon his cruelty, his indifference, his determination to get rid of his wife, his attempt to alarm her, and his sorrow when he realized the need of her. The justices decided upon all the facts before them, and estimated the quality of his actions on June 16 by reference to his conduct generally, and found that his intention was to break off matrimonial relations with his wife. His subsequent efforts to get his wife to return to him and his assurances of amending his conduct must be tried by the same test. No doubt desertion can be put an end to by cohabitation; but it is a very different proposition to say that a husband can obliterate his previous conduct by subsequent offers, as to the genuineness of which the wife may, upon reasonable grounds, entertain doubts.

Desertion is not a single act complete in itself and revocable by a single act of repentance.

The act of departure from the other spouse draws its significance from the purpose with which it is done, as revealed by conduct or other expressions of intention: see *Charter* v. *Charter*. (1) A mere temporary parting is equivocal, unless and until its purpose and object is made plain.

I agree with the observations of Day J. in *Wilkinson* v. *Wilkinson* (2) that desertion is not a specific act, but a course of conduct. As Gorell Barnes J. said in *Sickert* v. *Sickert* (3): "The party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion." That conduct is not necessarily wiped out by a letter of invitation to the wife to return. It must be for those who hear the whole evidence to decide whether the conduct amounting to desertion is no longer to be regarded, so that there is no excuse for the refusal of the other spouse to return. For the reasons given by the Divisional Court, I am of opinion that the justices rightly heard the evidence submitted to them, and came to a proper conclusion upon legal principles. The appeal must be dismissed with costs.

(1) 84 L. T. 272. (2) 58 J. P. 415.

(3) [1899] P. 278, 282.

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WARRINGTON L.J. This is an appeal by a husband from an order of the Divisional Court of the Probate, Divorce and Admiralty Division in substance affirming an order of justices made under the Summary Jurisdiction (Married Women) Act, 1895, upon a complaint by his wife that he had deserted her.

The justices found as a fact that on June 16, 1922, the appellant deserted his wife by compelling her to leave his house with the intention of breaking off matrimonial relations with her.

Neither before the Divisional Court nor before us was this finding disputed, but it was contended that desertion, in order to be a sufficient ground of complaint, must be continuing at the time of the proceedings before the justices, and that in this case the husband had put an end to the desertion by requesting his wife to return to him and expressing contrition for what he had done and his intention of behaving better in the future, and that the refusal of his wife to comply with such request did not prevent the expressed wish on his part to resume cohabitation from having the effect of determining his previous desertion.

The Divisional Court have held, affirming the view of the justices, that the question whether desertion continues is one of fact to be determined in view of the circumstances of the particular case, and that it having been proved to the satisfaction of the justices that before deserting his wife he had frequently ill-treated her, she was justified in refusing to comply with his request to return, and therefore the desertion had not been effectually determined.

In my opinion this decision is correct. In the first place there was ample evidence to support the finding of the justices. They saw and heard the witnesses and accepted the evidence on the part of the wife. Their finding cannot be set aside. It is true the last positive act of ill-treatment deposed to took place more than six months before the complaint to the justices, and therefore could not of itself be a substantive ground for an order; but if the Divisional Court was right in law in holding that the question as to the effect of the

husband's request is one to be determined in view of all the circumstances, then the evidence as to previous ill-treatment would clearly be relevant.

I am of opinion that the view of the Court on this point was correct. It has been determined by this Court that a decree for restitution of conjugal rights cannot be obtained by a party whose conduct affords reasonable grounds for a refusal by the other party to afford those rights: *Russell* v. *Russell*. (1) In my opinion the same principle applies to the present case; there was ample ground for the wife's refusal to return, and under those circumstances I think the actual separation must continue to have the quality of desertion by the husband; otherwise I see no alternative except to regard the wife as deserting him, which would be impossible. That under certain circumstances—as, for instance, the keeping by the husband of another woman in the house—a request for resumption of matrimonial relations would be ineffectual is admitted by counsel for the appellant, and in the face of this it seems to me impossible to contend that other circumstances, less strong no doubt, but still affording reasonable cause for a refusal to return, are not to be taken into consideration.

The learned judges of the Divisional Court do not decide, nor do I, that where there is nothing but a turning away of the wife, followed by a genuine expression of a desire on the husband's part for her return, the desertion would continue notwithstanding. In each case the question must be determined on its own merits, and here I think with the Divisional Court that the wife had reasonable cause for her refusal to return, and therefore the desertion was not determined.

I think the appeal should be dismissed.

SARGANT L.J. In this case the acts of the husband on June 16, 1922, unquestionably amounted to desertion, in the broad sense in which the word is used in matrimonial proceedings. On that date the husband, to use the words of

(1) [1895] P. 315.

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the learned President, "in language of great coarseness and with conduct amounting to something approaching brutality ordered his wife to leave the matrimonial home, and cast her off." This was done in spite of a deliberate warning by her parents at the time that the consequences of his conduct might be permanent. And as the direct and anticipated result of this conduct the wife with two of the three children left the matrimonial home at Greenwich and returned to her parents' house in Wales, where she continued to reside until after the hearing of her summons by the justices in December, 1922.

If this were all, the matter would be perfectly clear. The doubt, and that a serious one, is caused by the conduct of the husband in the interval. On the morrow of his wife's departure he appears to have realized the serious consequences of his conduct. He followed his wife down to Wales, attempted, though without success, to obtain an interview with her, and has since written her a number of letters full of expressions of apparently sincere repentance and of promises of amendment for the future, if she would resume cohabitation. These offers the wife very naturally has not been content to accept. And in these circumstances the question to be solved is whether in December, 1922, at the date of the hearing of the wife's summons by the justices the husband's desertion continued, or had been terminated by his intermediate offers.

In answering this question the justices and the Divisional Court have taken into consideration not merely the one definite act of expulsion on June 16, 1922, but the whole conduct of the husband throughout, including the long series of acts of insult and cruelty of which that act was the culmination, and the attitude of the husband since that act. And, having done so, they have come to the conclusion that the husband's conduct has not cured the original desertion, and has resulted in a continuing negation of any reasonably acceptable matrimonial home. In my judgment, this view is one warranted by the facts, and with which we ought not to interfere.

It was strongly urged by counsel for the appellant that

though the facts might be such as to justify the wife in resisting an application for restitution of conjugal rights, it does not follow that they are sufficient to establish a continuing desertion by the husband; and it was suggested that there might be a halfway house, an intermediate position in which the one spouse may be released from the obligation of cohabitation, while the other is nevertheless not guilty of a continuance of desertion. The reasoning of the learned President rather tends to negative this suggestion. But, in my judgment, it is unnecessary to decide this question for the purposes of this case. The conduct of the appellant here is such, taken as a whole, as to have caused and to continue to cause an exclusion of his wife from any proper matrimonial home.

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Appeal dismissed.

Solicitors: *Douglas Wiseman & Co.; Bridges, Sawtell & Co., for Gibson, Harris & Hiley, Brynmawr.*

G. A. S.

DIVORCE.

1924 *June* 17.

JONES *v.* JONES.

Husband and Wife—Appeal from Justices—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5 (*a*), 7—*Desertion—Separation Order—Effect of Resumption of Cohabitation on subsisting Order for Separation.*

An order for separation and maintenance under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, is not ipso facto discharged by a return to cohabitation, as a decree for judicial separation is. The Summary Jurisdiction Act by s. 5 (*a*) expressly provides that an order under the Act shall have the effect of a decree of judicial separation while "in force"; and s. 7 provides for the discharge of such an order "upon proof" of return to cohabitation. The result of these provisions is that a husband cannot, while an order for separation exists against him undischarged, be guilty of a fresh desertion in the event of his resuming cohabitation and then deserting his wife again, because until the discharge of the order he was not bound to cohabit.

THIS was a husband's appeal from an order of justices made December 20, 1923, on a summons taken out by the wife

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(respondent on the appeal) by which they had found the husband guilty of desertion by acts of persistent cruelty making it impossible for his wife to live with him ; and ordered that the wife was no longer bound to cohabit with him, and that he should pay her 25*s.* a week.

The parties were married on December 27, 1919. On January 12, 1921, a separation order was made on the application of the wife. In August, 1921, they returned to cohabitation and lived together till May 14, 1923. On that day the wife left her husband on the ground that his persistent cruelty had compelled her to live apart. She took out a summons alleging her husband was guilty of desertion by persistent cruelty which compelled her to leave him on May 14, 1923. On July 4, 1923, the husband obtained an order discharging the separation order of January 12, 1921. On August 20, 1923, the justices made an order for maintenance on the ground set forth in the wife's summons. The husband appealed, and the Divisional Court on October 16, 1923, referred the summons back to the justices for further hearing on the ground that though there was evidence of persistent cruelty there was not sufficient evidence that the wife was thereby driven to live apart. The justices then allowed the summons to be amended by alleging desertion on July 4, 1923, and made the order now appealed from, finding that the husband's application to discharge the separation order was made with the intention of relieving himself from the liability to support his wife. The wife had in June, 1923, written a letter to her husband declaring her intention of never living with him again.

The husband appealed to the Divisional Court.

Vernon Gattie for the appellant. The order appealed from was wrong in finding desertion at a time when it could not exist, because at the time the order alleged, no desertion by the husband could exist, for the wife had written a letter refusing to live with him. If the original date alleged in the summons were restored there could be no desertion at that date, for the separation order was not discharged, so no

desertion could have commenced to run: *Matthews* v. *Matthews*. (1)

Clifford Mortimer for the respondent. The resumption of cohabitation of itself put an end to the separation without any order of discharge. The judgment of Avory J. in *Matthews* v. *Matthews* (1) is to be preferred to that of the two other judges, and is supported by *Williams* v. *Williams*. (2)

HORRIDGE J. This is an appeal from the justices, who made an order on the ground of desertion. It has been said by Mr. Mortimer that prior to May 14 the appellant had treated his wife with great cruelty. A summons had been taken out before the justices, and they had made an order on the ground of persistent cruelty. That order, as I understand, was reversed by this Court, of which my brother Hill was a member, not on the ground that persistent cruelty was not proved, but on the ground that there was nothing to show that the persistent cruelty had anything to do with causing the cohabitation to come to an end. Mr. Mortimer says under those circumstances this man went away and left his wife on May 14 and, having regard to the previous cruelty, from that time she was entitled to decline to go back to him and that she did, in fact, decline to go back to him from May 14. If that was a desertion on May 14 the justices in this case would have been entitled, I think, to find that that desertion continued until July 4, the date named in the summons, because the wife, having regard to his previous conduct, was entitled to refuse to go back to him after the desertion on May 14. But the case depends entirely upon whether, or not, there was desertion on May 14. At that time there was a separation order existing between the parties, which contained what is called the non-cohabitation clause, and if that was then existing, there could be no desertion.

The fact that there could be no desertion has been established by a number of cases. I think the last case was a decision of my own which went to the Court of Appeal—because, as the parties were not bound to cohabit under the

(1) [1912] 3 K. B. 91. (2) [1904] P. 145.

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order, there was no desertion if they did not. It is said by Mr. Mortimer, however, that because the parties had previously resumed cohabitation that order was not in existence on May 14. There would be a good deal to be said for that view if it had not been already the subject of decision of a Court of co-ordinate jurisdiction with this Court, and one which, therefore, we should follow for the purposes of uniformity. That case is the case of *Matthews* v. *Matthews*. (1) It is a decision of the Court of King's Bench, and the point with regard to whether, or not, the separation order was discharged by cohabitation would have decided the appeal either way. It, therefore, was a point which arose for the express decision of the Court. It is quite true that there was another point which equally would have disposed of the matter, and all the judges agreed upon that other point, but upon the point which we have to consider Lord Alverstone and Pickford J., being the majority of the Court, gave a judgment which was not obiter but which was directly involved in the appeal. I cannot put the matter more clearly than by quoting the judgment of Pickford J. He refers to the earlier case of *Haddon* v. *Haddon* (2), which had arisen under s. 4 of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), and he says that if the application before them had been made under that Act and not, as in that case it was and in this case it is, under the Summary Jurisdiction (Married Women) Act of 1895, that decision would have been binding upon them, but he points out that the Act of 1895 expressly alters the provisions of the Act of 1878. He says (3): "First, the wording of s. 4 of the Act of 1878 that a separation order under that Act should 'have the force and effect in all respects of a decree of judicial separation on the ground of cruelty,' and secondly, that no power was given by that Act to vary or discharge a separation order, although there was power to vary an order for the payment of a weekly sum, and that consequently separation orders were left with the same force and effect as a decree of judicial separation on the ground of

(1) [1912] 3 K. B. 91. (2) (1887) 18 Q. B. D. 778.
(3) [1912] 3 K. B. 101, 102.

cruelty. As such a decree ceased to be binding if the parties resumed cohabitation, so it was said a separation order became invalid in the same circumstances. Both these points are met by the alteration of the language in s. 5 of the Act of 1895. Instead of enacting that a separation order 'shall have the force and effect in all respects of a decree of judicial separation' the Act of 1895 enacts that the provision 'while in force shall have the effect in all respects of a decree of judicial separation.' Then by s. 7 of the Act express power is given to the Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which the original order was made to alter or discharge any such order. Having enacted that, the section goes on to provide that if any married woman upon whose application an order has been made shall voluntarily resume cohabitation with her husband, such order shall upon proof thereof be discharged. It seems to me that care was taken by the Legislature to meet both the arguments which prevailed in *Haddon* v. *Haddon*. (1) The order for payment remained in force until it was discharged by a new order and did not come to an end automatically on resumption of cohabitation. It was therefore in force when the matter came before the Brentford justices and they had no power to treat it as at an end." He then goes on to say this: "As to whether on proof of a return to cohabitation the order should be discharged as from the date of the return or from the date of proof, I say nothing. The case of *Ruther* v. *Ruther* (2) seems to indicate that the order should be discharged as from the later date"—that is the date of proof when the application was made to the justices—"but I refrain from expressing any decided opinion on this point." He takes the view that the order is only discharged from the time of the order of the justices discharging it. At any rate, I think, that if this point was going to be raised the order ought—on the face of it—to discharge the earlier order from the date of the resumption of cohabitation, and as it has not done anything of the kind, but merely is a discharge of the

(1) 18 Q. B. D. 778. (2) [1903] 2 K. B. 270.

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order as from the date of the subsequent order, it is not possible for us to say that the earlier order was not binding and in effect on May 14, when the desertion is alleged to have taken place. It is, therefore, quite clear that there has been no desertion since May 14 and that the separation on May 14 was not desertion, because it was at a time when the non-cohabitation clause was in full operation.

Therefore, this appeal must be allowed and the order must be discharged.

HILL J. I agree.

Solicitors for appellant: *Gibbs, White & King, for John Moxon, Newport, Mon.*

Solicitors for respondent: *Kinch & Richardson, for Lyndon Moore & Co., Newport, Mon.*

J. R. B.

C. A.

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June 30; *July* 1, 15.

[IN THE COURT OF APPEAL.]

THE CHRISTEL VINNEN.

Shipping—Damage to Cargo—Bill of Lading—Unseaworthiness—Defective Rivet—Excepted Perils—"Latent defects in hull"—Perils of the Sea occasioned by Negligence—Damage increased by Failure to pump.

The plaintiffs' cargo of maize was carried in the defendants' vessel under a bill of lading containing the following clause: "The steamer shall not be liable for loss or damage occasioned by . . . . perils of the sea . . . . or any latent defects in hull . . . . or by other accidents arising in the navigation of the steamer, even when occasioned by the negligence . . . . of the servants of the shipowner."

A defective rivet allowed water to flow into the vessel. Had the pumps been duly sounded the leakage would have been discovered and the inflow of water kept under. The cargo was damaged by the sea water:—

Held, that the vessel was unseaworthy; that the exception of "latent defects in hull" did not qualify the implied warranty of seaworthiness; and that, although the damage to the cargo was increased by the negligent failure to pump, the dominant cause of the damage was the unseaworthiness. It followed, therefore, that the shipowner was responsible for the whole of the damage and not only (as held by Hill J.) for the proportion of the damage done before the time when but for the negligence the inflow of water would have been checked.

Judgment of Hill J. ante p. 61 varied.

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APPEAL AND CROSS-APPEAL from the decision of Hill J. (1)

The plaintiffs, as holders of a bill of lading of a cargo of maize laden on board the defendant's schooner *Christel Vinnen*, claimed the amount of the damage sustained in respect of the non-delivery of about half the bill of lading quantity and delivery in a damaged condition of the remainder. The bill of lading incorporated the terms of a charterparty containing the following exception clause: "The steamer shall not be liable for loss or damage occasioned by . . . . perils of the sea . . . . or any latent defects in hull . . . . or by other accidents arising in the navigation of the steamer, even when occasioned by the negligence . . . . of the servants of the shipowner." The loss and damage arose owing to an inflow of sea water into the bilges through a rivet hole in the port bilge; but the defendant contended (*a*) that, even assuming there was a defective rivet, he was exempted from liability as the warranty of seaworthiness was qualified by the exception of latent defects in hull; and (*b*) that, even if the ship was unseaworthy, which he denied, the damage was caused, not by the unseaworthiness, but by the failure of those on board the ship to sound the pumps at proper intervals, in which case the water would never have overflowed the bilges and reached the cargo. The cause of the damage, therefore, was within the excepted perils—namely, perils of the sea, or other accidents in the navigation of the ship, "even when occasioned by negligence."

The facts are fully set out in the judgment of Hill J., who held that the vessel was unseaworthy, but that the defendant could rely on the exception for so much of the damage as was caused by the failure to pump; and that the plaintiffs could only recover that proportion of the damage, which he estimated at 50 per cent., caused by the first inflow of water due to the unseaworthiness, i.e., the damage done before the time when, but for the negligence, the inflow of water would have been detected and countered.

The defendant's counterclaim for the cargo's proportion

(1) Ante, p. 61.

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of general average in respect of expenses incurred in putting into Rio de Janeiro as a port of refuge was dismissed on the ground that the cause of the ship putting into Rio was the unseaworthiness, and the fact that the negligence aggravated the damage to the cargo was immaterial. (1)

The defendant appealed and the plaintiffs cross-appealed.

Bateson K.C. and *G. St. C. Pilcher* for the appellant. The learned judge was wrong in allowing the cargo owners 50 per cent. of their damage. The shipowner is protected by the exceptions in the bill of lading. First, the water got into the ship owing to a latent defect in the hull, and, secondly, the damage was entirely due to the negligent failure to pump. In order to succeed, the cargo owners must prove unseaworthiness and damage resulting therefrom : cf. *The Cargo ex Laertes*. (2) There is no evidence that any of the damage was due to unseaworthiness. The vessel was perfectly fit to carry the cargo, and no damage at all would have been done if those on board had sounded the pumps at proper intervals. The Elder Brethren were of opinion that soundings should have been taken twice a day. The defective rivet constituted a latent defect, an exception which must limit the warranty of seaworthiness, as a latent defect in hull could hardly arise after the voyage began : see, as to latent defects, *Owners of Cargo on board S.S. Waikato* v. *New Zealand Shipping Co.* (3); *Jackson* v. *Mumford* (4) ; *Hutchins Bros.* v. *Royal Exchange Assurance Corporation*. (5) A latent defect means a defect which could not have been discovered by reasonable care and skill on the part of the shipowner and his servants. It is none the less latent, qua the shipowner, because the builder's servants might possibly have discovered that there was a defective rivet.

[*The Dimitrios Rallias* (6), *The Europa* (7) and *Kish* v. *Taylor, Sons & Co.* (8) were also referred to.]

(1) The hearing of the counter-claim, which stood over at the trial of the action and depended entirely on questions of fact, was heard on March 26, 1924.

(2) (1887) 12 P. D. 187.

(3) [1899] 1 Q. B. 56.

(4) (1902) 8 Com. Cas. 61, 69.

(5) [1911] 2 K. B. 398.

(6) (1922) 16 Asp. M. L. C. 62.

(7) [1908] P. 84.

(8) [1912] A. C. 604.

If the appellant is right in his contention that the cause of the damage was not unseaworthiness, it follows that the counterclaim in respect of the cargo owners' proportion of general average should be allowed.

R. A. Wright K.C., *Stephens K.C.* and *W. van Breda* for the respondents and cross-appellants. The cargo owners are entitled to the whole of their damage. The ship was unseaworthy, and the shipowner is not protected by the exception "latent defects in hull," which does not qualify the implied warranty that the ship shall be seaworthy at the commencement of the voyage : see *The Carib Prince* (1), a decision of the Supreme Court of the United States on these exact words ; see also Carver's Carriage of Goods by Sea, 6th ed., ss. 79 (*a*) and 102 (*a*). In *The Cargo ex Laertes* (2), relied on by the appellant, the exception clause contained the words "latent defects in machinery even existing at the time of shipment" ; these latter words are absent in the charterparty now in question.

[They were stopped on this point.]

There was initial unseaworthiness, and this remained a continuing cause of the damage. There was no novus casus interveniens : cf. *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (3) The wrongdoers in the present case have aggravated the damage by their own negligence, and they are not protected in any event, as the "peril of the sea" was the water getting into the ship due to unseaworthiness, and this was the real cause of the whole of the resulting damage.

[Reference was also made to *Steel* v. *State Line Steamship Co.* (4); *Gilroy, Sons & Co.* v. *Price & Co.* (5); *Hedley* v. *Pinkney & Sons Steamship Co.* (6); and *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (7)]

As regards the shipowners' counterclaim, Hill J. was right in holding that the cause of the vessel putting into a port of

(1) (1898) 170 U. S. 655.
(2) (1887) 12 P. D. 187.
(3) [1918] A. C. 350.
(4) (1877) 3 App. Cas. 72.
(5) [1893] A. C. 56.
(6) [1894] A. C. 222.
(7) [1922] 2 A. C. 250, 260.

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refuge was that the vessel had sprung a leak—due to unseaworthiness—and therefore that the claim for a general average contribution from the cargo owners failed.

G. St. C. Pilcher replied.

Cur. adv. vult.

July 15. The judgment of the Court (BANKES, SCRUTTON and ATKIN L.JJ.) was delivered by

SCRUTTON L.J. The judgment I am about to read is to be taken as the judgment of the Court.

The *Christel Vinnen*, a steel motor schooner built by Messrs. Krupps, on her first cargo carrying voyage sprang a leak and put back to Rio. Water entering through the leak damaged her cargo of maize, but much less damage would have been done—the judge finds only half the actual damage—had those on board been ordinarily careful in taking soundings. They were negligent, and did not discover water in the hold until long after they ought to have been aware of it.

The leak was through a rivet hole from which the rivet had dropped out. As there was no sign of straining on any adjacent rivets, I agree with the view of the judge below that the rivet was a defective rivet when the voyage started, and that, therefore, the ship was unseaworthy.

The shipowner sued by the cargo owner for damage to the maize replies that he is protected by the exceptions: "damage occasioned by a latent defect in the hull . . . . even where occasioned by the negligence of the servants of the shipowner." It is clear law that exceptions do not apply to protect the shipowner who furnishes an unseaworthy ship where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the implied warranty of seaworthiness. *Owners of Cargo on board S.S. Waikato* v. *New Zealand Shipping Co.* (1) is an instance of ambiguity defeating the shipowner's probable intention: see the judgment of Collins L.J. In *The Cargo ex Laertes* (2) the words which protected the shipowners were "latent defects in machinery even existing at the time of shipment."

(1) [1899] 1 Q. B. 56, 58. (2) 12 P. D. 187.

Such words are absent in the present case and latent defects may come into existence during the voyage. In my view the shipowner here had not clearly excluded or modified the implied warranty of seaworthiness, and consequently the exception does not apply to protect him when water entering through unseaworthiness causes the damage, as is undoubtedly the case as to half the damage here. The shipowner's appeal against the judgment below, holding him liable for half the damage, therefore fails.

But the judge below has excused the shipowner from liability from the other half of the damage on the ground that this loss was occasioned by the negligence of the shipowner's servants, and therefore that the admitted unseaworthiness did not cause the loss. This raises in my view a novel point, and unfortunately raises it on a badly worded exception clause. The negligence exception is frequently a separate exception against loss by negligence; in the present case, it is dependent on separate exceptions as to perils causing loss. The shipowner is protected from loss occasioned by collision, even when the collision is occasioned by negligence. I think this, and not "even when the loss is occasioned by negligence," is the true reading of the clause. He is protected against loss caused by perils of the sea, even though the peril of the sea is occasioned by negligence. But in this case the peril of the sea is not occasioned by negligence; if the entry of seawater is the alleged peril, it is occasioned by unseaworthiness. Lord Finlay says in *P. Samuel & Co.* v. *Dumas* (1): "The view that the proximate cause of the loss when the vessel has been scuttled is the inrush of the seawater, and that this is a peril of the sea, is inconsistent with the well-established rule that it is always open to the underwriter on a time policy to show that the loss arose not from perils of the seas but from the unseaworthy condition in which the vessel sailed: see Arnould on Marine Insurance, s. 799. When the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it would never be said that the loss was due to the perils of the sea. It is

(1) [1924] A. C. 431, 455.

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true that the vessel sank in consequence of the inrush of water, but this inrush was due simply to the unseaworthiness. The unseaworthiness was the proximate cause of the loss." The shipowner is trying to read the exception as if it were: "even if the loss consequent on the perils of the sea was occasioned by negligence." Another way of putting the point is that under recent decisions you look at the direct or dominant cause, and it is immaterial that another cause assists it. In *P. Samuel & Co.* v. *Dumas* (1) the direct cause was the scuttling; it was immaterial that entry of seawater, usually a peril of the sea, caused the loss. In *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (2) the direct cause was the explosion of the torpedo; it was immaterial in the view of the House of Lords that a subsequent storm, which might or might not have happened, completed or increased the loss. In *Reischer* v. *Borwick* (3) the collision was the direct cause, and subsequent negligence in stopping the hole did not prevent the sinking being caused by the collision. I am aware that these are policy cases, but they are now established by the highest tribunal, and I think their ratio decidendi governs this case. The water which entered and did the damage entered through unseaworthiness; its effects when in the ship might have been partially remedied by due diligence, which the shipowner's servants did not take. But in my view the cause of the resulting damage is still unseaworthiness; the shipowner cannot show any exception to protect him from any part of the damage. In the case of tort, no doubt the plaintiff complaining of damage done cannot recover for any part of that damage which he could have prevented by reasonable care. But here the man who has by his original breach of contract caused the opportunity for damage has by the negligence of his servants increased it. He cannot show any exception to protect him, and cannot show that the dominant cause of the damage was not the unseaworthiness which admitted the water into the ship. In my view, therefore,

(1) [1924] A. C. 431. (2) [1918] A. C. 350.
(3) [1894] 2 Q. B. 548.

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the cross-appeal must be allowed and the shipowner held liable for all the damage instead of for half of it.

As the shipowner has broken his contract and is not protected by any exception in the bill of lading, it follows he cannot recover for any sacrifice or expenditure rendered necessary by his own breach of contract; his counterclaim therefore fails and should be dismissed.

The appeal of the shipowner should be dismissed with costs, and the appeal of the cargo owners allowed with costs here and below.

Appeal dismissed.
Cross-appeal allowed.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondents: *Richards & Butler.*

E. C. M. T.

ADMIRALTY.

1924
March 26; *May* 16, 19, 20; *July* 25.

THE CEDERIC.

Shipping—Collision—Duty of overtaken Vessel—"Keep Course and Speed"—Gradual Increase of Speed as Engines develop their Capacity—Regulations for Preventing Collisions at Sea, 1910, *art.* 21.

The plaintiffs' steamship *M. I.* was proceeding down river with her engines working at half speed. She then put the engines full speed ahead and for about twenty minutes, as the engines developed their capacity, her speed was increasing from about 6 knots to 7½ or 8. When the *M. I.* put her engines full speed ahead, the defendants' steamship *C.*, a faster vessel, was about two miles astern of the *M. I.* The *C.* gradually overhauled the *M. I.* and endeavoured to pass her. Before she had drawn clear a collision took place. The defendants alleged (inter alia) that the *M. I.*, as the overtaken vessel, failed to keep her speed in accordance with art. 21 of the Regulations for Preventing Collisions at Sea:—

Held, that the development of speed was not a breach of art. 21; that the article did not require the *M. I.* to diminish her speed or to keep it at a reduced rate; and that the *C.*, for attempting to pass in a narrow reach of the river, was alone to blame.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Mar de*

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THE CEDERIC.

Irlanda; the defendants were the owners of the steamship *Cederic*. The collision took place on February 11, 1923, in the River Odiel, Spain, while the two vessels were proceeding down the river, laden, from Huelva to Bordeaux and Ghent respectively. The tide was flood with the force of about 1 to 1½ knots and the weather was fine and clear. The *Mar de Irlanda*, a vessel of 3080 tons gross register, was capable of a maximum speed of about 8 knots. The *Cederic*, a vessel of 4101 tons gross, was capable of a maximum speed of about 9½ knots. The collision occurred while the *Cederic* was overtaking the *Mar de Irlanda*, and the defendants alleged (inter alia) that the *Mar de Irlanda*, which was working up to her full speed, did not "keep her speed" in accordance with art. 21 of the Regulations for Preventing Collisions at Sea.

Stephens K.C. and *E. A. Digby* for the plaintiffs.

Bateson K.C. and *Alfred Bucknill* for the defendants.

[In the course of the arguments *The Roanoke* (1) and *The Echo* (2) were referred to.]

Cur. adv. vult.

July 25. DUKE P. (3) [After setting out the description of the vessels and their speeds, continued as follows:] On the morning of February 11, the *Mar de Irlanda*, proceeding down river from Huelva, passed the *Cederic* while that vessel was still at her anchorage off La Cascajera, some four or five miles above the place where the collision occurred. The *Mar de Irlanda* proceeded at half speed in the usual down river channel until she was passed at about a mile below La Cascajera by a small steamship, the *Vicente Ferrer*. The *Mar de Irlanda*, after passing the *Vicente Ferrer*, put her engines at full speed ahead and gradually increased her speed from about 6 knots to 7½, or perhaps 8.

The *Cederic*, as soon as her master and pilot became aware of the *Mar de Irlanda's* slower speed, shaped to pass her. They proposed to pass on her port side, and proceeded safely

(1) [1908] P. 231.
(2) [1917] P. 132.
(3) The judgment was read by Hill J., the President being unable to attend owing to indisposition.

with that intent until the *Cederic* had drawn ahead of the *Mar de Irlanda* to the extent that the stem of the *Mar de Irlanda* was about abreast of the after mast of the *Cederic*. Then the vessels collided. The distance between the vessels at that time is in dispute.

On the part of the *Mar de Irlanda* it is alleged that the distance between the vessels was about 100 feet; that it was improper for the *Cederic* to attempt to pass at the place in question; that the *Cederic* improperly altered her course or was allowed to sheer or fall towards and into collision with the *Mar de Irlanda;* that she was proceeding at an excessive speed; and that being an overtaking vessel within the meaning of art. 24 of the Collision Regulations she failed to keep out of the way of the *Mar de Irlanda*, an overtaken vessel.

The owners of the *Cederic* allege that the distance between the vessels at the time when the *Cederic* proceeded to pass was as much as 150 feet, and that the cause of the collision was that while the *Cederic* was drawing ahead all clear of the *Mar de Irlanda*, the latter suddenly altered her course to port, and, in spite of steps taken on board the *Cederic* by engine action and helm action, struck the *Cederic* first with the bluff of her port bow and afterwards with her stem. The defendants further allege that in breach of art. 21 of the regulations the *Mar de Irlanda* at the material times failed to keep her course and speed and either improperly starboarded her helm or was caused or allowed to fall off to port; and they allege that the *Mar de Irlanda* failed to ease, stop or reverse her engines in due time or at all. [His Lordship then dealt with the evidence on the respective allegations of negligence, which are immaterial to this report, and continued as follows:] I find that the *Cederic*, at a speed of 9 knots at a part of the river where the waterway was less than 250 feet wide and when she was as near the east bank as she could venture to go, proceeded to pass the *Mar de Irlanda* at no more than 100 feet distance; that the *Mar de Irlanda*, after she passed buoy No. 7, kept a direct heading for buoy No. 5 with that buoy slightly on her starboard bow; that she did

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not starboard her helm ; that her engines during all this time were kept at full speed ahead ; and that very shortly before the collision she had about reached her maximum effective speed. While the *Cederic* under these circumstances was passing the *Mar de Irlanda* the collision occurred. The *Cederic* was at the material times an overtaking ship, and the *Mar de Irlanda* an overtaken ship. The *Cederic* had upon her an obligation under art. 24 to keep out of the way of the *Mar de Irlanda*. The latter vessel was required by art. 21 to keep her course and speed.

Apart from legal considerations it appears to me that the conduct of those in charge of the *Cederic* in pressing forward to pass the *Mar de Irlanda* in the reach of the river where the collision occurred was imprudent and indeed reprehensible. For some reason which did not appear, the pilot of the *Cederic* was not called or examined; but upon the facts as they stand he, knowing the character and narrow width of the channel, pressed on to pass another large steamship, when according to the *Cederic's* account he could only do so by coming close to the bank on the east side, and when those on board the *Cederic* were well aware of the intention of the pilot and master of the *Mar de Irlanda* not to depart from the course on which they were proceeding so as to give way to the *Cederic*.

Prima facie, the *Cederic* was to blame for the collision. It is not necessary to determine whether her falling off to starboard was due to helm action. Having regard to the position in which she was, in close proximity to the shoal on the eastern side of the channel, the Elder Brethren advised me that being near the bank and "smelling the bottom" she may have sheered. If her falling off was not due to this cause, it appears to me an inevitable conclusion that her helm was put to port because of her close approach to the bank. But I accept the view of the Elder Brethren.

In the view I took of the facts at the hearing, I should have felt no difficulty in giving judgment then for the plaintiffs, had it not been that a powerful argument of Mr. Bateson on the defendants' behalf was directed to establish that upon

the true view of the case the *Mar de Irlanda*, being an overtaken ship, failed to keep her course and speed and thereby brought about the collision. Mr. Bateson claimed to establish that the *Mar de Irlanda* after becoming an overtaken ship substantially increased her speed, and that she caused or contributed to the collision by helm action taken just before the collision. He argued that if the *Mar de Irlanda* had proceeded at the speed she had when the *Cederic* began to overhaul her, the *Cederic* could have passed in safety, and that she would have done so in the events which happened but for later helm action of the *Mar de Irlanda*. He relied also upon passages in the evidence to show that the place of collision was well over on the east side. As to the place of collision I have had no hesitation in accepting the evidence of the pilot and helmsman of the *Mar de Irlanda*. As to the charge of improper helm action I accept the evidence of the same pilot. The only particular in which the *Mar de Irlanda* could be said not to have kept her speed was that for twenty minutes or thereabouts before the collision her speed was increasing as her engines developed their capacity after being put at full speed ahead. It would seem to me unreasonable to treat this development of speed as a failure to keep the ship's speed and therefore a breach of art. 21. Neither upon the wording of the article, nor upon the authority of any decision of which I am aware, am I prepared to hold that a vessel going down river in a stream like the Odiel is bound, upon becoming aware that a speedier vessel is gaining upon her, to diminish her speed or to keep it at a reduced rate, in order that the speedier vessel may pass her. Moreover, the *Mar de Irlanda* was proceeding at full speed ahead, though she had not developed her full rate of speed, when the *Cederic* was two miles behind her, and those on the *Cederic* were aware that the speed of the *Mar de Irlanda* was increasing and that she would not give way to the *Cederic* some minutes before they decided to pass her in the narrow reach near buoy No. 5. The collision resulted from their decision to take this improper course at a time when the *Cederic* was well astern of the *Mar de Irlanda*, and a slight reduction of her own speed for about a quarter

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of an hour would have brought her safely to the crossing of the bar.

I have not attempted to define the point of time at which with relation to each other the *Cederic* became an overtaking ship and the *Mar de Irlanda* an overtaken ship within the meaning of the regulations. A time when these relationships clearly existed was when the *Cederic*, being still astern of the *Mar de Irlanda*, was proceeding at her superior speed in order to pass. No doubt the *Cederic* could at some earlier point of time and perhaps substantially earlier have been correctly described as overtaking the *Mar de Irlanda*. I have difficulty, however, in seeing how the latter vessel could at any substantially earlier time be described as "overtaken." Upon the facts as I find them this question of a precise point of time seems to me to be of no considerable importance.

For the reasons I have stated I hold the *Cederic* to have been alone to blame for the collision; and there will be judgment accordingly.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*

Solicitors for the defendants: *Ince, Colt, Ince & Roscoe.*

E. C. M. T.

PROBATE.

1924
April 14;
June 23.

In re JESSOP.

Probate — Will — Evidence — Alterations — Interlineations — Declarations of Testator before and after Execution.

Declarations by a testator made before the execution of his will which support the inclusion therein of unattested alterations or interlineations are admissible as evidence for that purpose. It is however clear that declarations by him of the same character made after the execution are inadmissible.

THIS was a motion for probate of the will of John de Burgh Jessop with the alteration and addition mentioned below.

The draft will, as settled by the testator's solicitor, contained the following words on its first page: "I bequeath to each of my sisters Mabel Alleyne Hurt and Dorothy Babington Johnson the sum of 1000*l.* free of legacy duty and to my sister Eva Fitzherbert Jessop 5000*l.* free of legacy duty."

When the will was brought in for probate the figures 5000*l.* had been struck out and 1000*l.* written in, and after the words "free of legacy duty" the words "and 1000*l.* to my god-daughter Judith Alleyne Hurt" had been added as an interlineation. Both these alterations were in the testator's handwriting and marked with his initials "J. de B. J.," but they were not initialed by the witnesses.

The will was duly executed on June 21, 1921. The testator died on March 23, 1924. No question arose on the other parts of the will, and all the beneficiaries, including the sister whose legacy was reduced, assented to the application.

On June 16, 1921, five days before the execution of the will, the testator wrote to his solicitor: "I see in the will you sent that 5000*l.* is left to my youngest sister. As she is to be married in September I shall alter it to 1000*l.* and initial it as it will save having to make it out again." In reply the solicitor wrote on the next day that the copy sent was only a draft will and that they would send a fair copy for the testator's execution if he would send the draft back with any

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alterations desired. The testator however made the alterations and executed the draft will as already altered, and the same day after execution wrote to his solicitors: "I have signed the draft will and put in two alterations as you see. I hope it is in order." The executors now moved for probate.

One of the witnesses to the will had made an affidavit, but could not remember whether the alterations were made before or after execution. The other witness could not be found.

Mr. Guerin, an expert in handwriting, gave evidence from examination of the document that the two alterations were made at the same time, and the judge expressed himself satisfied by his own observation that this was the fact.

Bayford K.C. and *T. Bucknill* for the motion. The letter written by the testator to his solicitor before the execution of the will is admissible to show that the alteration was consistent with the testator's intention and made before the will was executed: *Doe* v. *Palmer* (1); *In the Goods of Sykes.* (2) As to the letter written afterwards, statements made by a testator after execution have been held admissible to prove what document constituted the will: *Gould* v. *Lakes.* (3) They were formerly held inadmissible to prove either execution or alterations: *Atkinson* v. *Morris* (4); *In the Goods of Sykes* (2); *In the Goods of Adamson.* (5) But in *Sugden* v. *Lord St. Leonards* (6) Cockburn C.J. throws doubt on the proposition as regards alterations, though he maintains it as regards execution.

H. W. Barnard for a party interested.

Cur. adv. vult.

June 23. HILL J. The question is whether the will is to be admitted to probate with an alteration and an addition on p. 1, or without them. The alteration is of 5000*l.* to 1000*l.* in the amount of a legacy for the testator's sister. The

(1) (1851) 16 Q. B. 747.
(2) (1873) L. R. 3 P. & M. 26.
(3) (1880) 6 P. D. 1.
(4) [1897] P. 40.
(5) (1875) L. R. 3 P. & M. 253.
(6) (1876) 1 P. D. 154.

addition is the interlineation of a legacy of 1000*l.* to a god-daughter of the testator. Both are initialed by the testator and are in his handwriting. Neither is attested. The will as a whole is duly witnessed, but the witnesses are unable to state whether or not the alteration and addition had been made at the date of execution. They only saw the last page. If there be no evidence the presumption is that they were made after execution. There is no internal evidence from the document itself from which a conclusion can be drawn either way as to the alterations as a whole; but from my own examination of them and from the evidence of Mr. Guerin I am satisfied they were both made at the same time. If a letter written by the testator on the day of execution, but, as shown by its terms, after execution, and a letter written by him five days earlier are admissible as evidence, the presumption would be rebutted and it would be established that the alteration and addition were made before execution. But I think it is clear law that on a question of execution, declarations of the testator made after execution are not admissible: *Doe* v. *Palmer* (1); *In re Goods of Adamson* (2); and other cases. To admit such evidence would be to substitute a mere statement of the testator for the attestation required by the statute.

I cannot find that the contrary view has ever been put higher than in the following passage in Cockburn C.J.'s judgment in *Sugden* v. *Lord St. Leonards* (3), where he quotes Lord Campbell (1): "And, for the same reason, a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible"; and Cockburn C.J. says: "This may be more doubtful. But assuming it to be right, it does not touch the present case."

I do not think I am entitled to have regard to the declarations after execution. Declarations of intention by the testator made before the execution of the will have been admitted as evidence that the alteration which gives effect to that intention was made before execution: *Doe* v.

(1) 16 Q. B. 747. (2) L. R. 3 P. & M. 253.
(3) 1 P. D. 154, 228.

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Palmer. (1) The declaration there was a declaration of an intention to benefit a certain person who was not mentioned in the will otherwise than in the interlineation. And if evidence of a general intention is admissible, evidence of the specific intention to alter the 5000*l.* to 1000*l.*—i.e., to make the specific alteration which appears in the will—must, a fortiori, be admissible.

I have before me evidence of such intention in the letter written by the testator before execution—namely, on June 16, 1921. Admitting the letter of June 16, 1921, I am satisfied that the alteration from 5000*l.* to 1000*l.* was made before execution. And as I am satisfied that the interlineation was made at the same time, I come to the conclusion that the presumption is rebutted as to it also. And I find that it was made before execution.

Solicitors for all parties: *Tarry, Sherlock & King.*

J. R. B.

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July 10, 11.

[IN THE COURT OF APPEAL.]

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Shipping—Dock Dues—Contract of Affreightment—"Consignees to pay two-thirds of the dock dues"—Timber Cargoes—Port of London Authority Charges—Erroneous Basis of Calculation—Validity—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *ss.* 13, 14.

Under the shipping and docking rates fixed by the Port of London Authority under their statutory powers given by the Port of London Act, 1908, "vessels with part cargoes of wood and carrying no other cargo" are charged "3*d.* per ton on the net register and on the deck cargo space (if any) occupied, and 10*d.* per ton on the weight of the wood discharged," plus an authorized additional war charge of 150 per cent. To ascertain the weight of the wood discharged, it being impracticable to weigh it, the Port Authority adopted a "rule of thumb" calculation on a space basis—namely, that a standard of 165 cubic feet of sawn deals weighs 2½ tons.

The defendants' consignment of soft round wood, together with other consignments of timber, was discharged from the plaintiffs' ship in the Surrey Commercial Docks. Under the terms of the charterparty incorporated in the bill of lading, "if discharged in a dock in London the

(1) 16 Q. B. 747.

consignees to pay two-thirds of the dock dues." The plaintiffs, having paid the Port Authority 77*l.* 4*s.* 7*d.*, the sum demanded by them in respect of dock dues, claimed from the defendants 24*l.* 3*s.* 10*d.* as the proportion of that amount attributable to their consignment. Round wood admittedly weighs less than sawn wood, and the defendants contended that their proper proportion of dues, worked out on a weight basis and not on the space basis adopted by the Port Authority, was not more than 20*l.* 6*s.*, which they paid into Court:—

Held, that the Port Authority had no power to levy dues on a formula which, applied to round wood, was manifestly erroneous; that each consignee was only liable to the shipowners for his exact proportion of two-thirds of the dues calculated, as regards the 10*d.* rate, on a weight basis; and that accordingly the amount paid into Court was sufficient.

APPEAL from a decision of the Divisional Court (Duke P. and Hill J.) reversing a decision of the judge of the Mayor's and City of London Court in an action in respect of dock dues.

The plaintiffs, the owners of the Danish steamship *Hamlet*, sued the defendants T. P. Jordeson & Co., timber merchants of London, for 24*l.* 3*s.* 10*d.*, as being the defendants' proportion of dock dues on a consignment of 72·52 fathoms of soft round wood discharged ex the *Hamlet* in the Surrey Commercial Docks.

The bill of lading incorporated the terms of a charterparty, which provided that "If discharged in a dock in London the consignees to pay two-thirds of the dock dues."

The *Hamlet* had a cargo of wood partly to be discharged in London and the remainder at Great Yarmouth.

There were two other consignments of wood discharged in the Surrey Commercial Docks, 132 loads of aspen wood (according to the bill of lading), but in fact 160·80 loads, consigned to Bryant & May, and 51·26 fathoms of round wood consigned to Blumenthal & Co. of London. According to the "rates on shipping dues" of the Port of London Authority fixed under the statutory powers given them by the Port of London Act, 1908, "vessels with part cargoes of wood and carrying no other cargo" are charged "3*d.* per ton on the net register and on the deck cargo space (if any) occupied, and 10*d.* per ton on the weight of the wood discharged," plus an authorized addition of 150 per cent. To ascertain the weight of the wood discharged the Port Authority adopt a

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"rule of thumb" calculation based on a space basis—namely, that a St. Petersburg standard of 165 cubic feet of sawn deals weighs $2\frac{1}{2}$ tons.

The plaintiffs, having paid the Port Authority 77*l.* 4*s.* 7*d.*, the sum demanded by them in respect of dues, claimed from the defendants 24*l.* 3*s.* 10*d.* A standard of soft round wood, however, weighs less than a standard of sawn wood, and the defendants contended accordingly that their proper proportion of dues worked out on a weight basis, and not on the space basis adopted by the Port Authority, was not more than 20*l.* 6*s.*, which they paid into Court.

The judge of the Mayor's and City of London Court gave judgment for the plaintiffs. He said: "They (1) seem to adopt a rough-and-ready way, assuming the weight, but no doubt it is substantially accurate. The wood being round it is obvious the weight must vary from time to time, and I think all persons accepting consignments of timber brought by the ship and unloading must be taken to know—I think they must know—the principle adopted by the docks."

The defendants appealed to the Divisional Court, which reversed the judgment of the Court below on the ground that the formula adopted by the Port of London Authority for ascertaining the weight of wood cargoes was manifestly erroneous when applied to consignments of soft round wood, there being no justification for apportioning upon a space basis a charge which could only be made upon a weight basis.

The plaintiffs appealed.

C. R. Dunlop K.C. and *Trapnell* for the appellants. As the amount involved is less than 50*l.* the appeal is limited to questions of law, and the Divisional Court treated as questions of law what are really questions of fact—namely, the weight of the respective consignments and the alleged overcharge; the judge of the Mayor's and City of London Court did not

(1) Some discussion was caused in the course of the arguments by the ambiguous use of the word "they." Hill J. thought the learned judge was referring to the consignees, Bankes L.J. thought the reference was to the Port of London Authority.

apply any wrong principle of law. The amount paid into Court is clearly insufficient, because under the contract of affreightment each consignee is liable for the whole two-thirds of the dock dues and not merely for his proportion: cf. *Porteus* v. *Watney* (1) and *United States Shipping Board* v. *R. Durrell & Co.* (2)

[SCRUTTON L.J. You cannot raise that point. Both judges in the Divisional Court expressly state that it was common ground that the consignees were only liable for their proper proportion.]

The shipowner can rely on the contention that each consignee is liable in full in answer to the allegation that Bryant & May paid too little on their consignment; he can claim from the respondents the balance that Bryant & May ought to have paid.

The shipowner acted reasonably in paying the dues; he did not know the actual weights and was not bound to litigate the question with the Port of London Authority. Having acted reasonably he is entitled to recover from the consignees two-thirds of what he has paid. Space measurement is the fairest method of ascertaining the dues, and the formula adopted is substantially accurate.

MacKinnon K.C. and *Stranger* for the respondents were not called on.

BANKES L.J. This is an appeal from a Divisional Court, reversing a judgment of the learned judge of the Mayor's and City of London Court. The action was brought by shipowners against the consignees and holders of bills of lading for what was said to be their proportion of dock dues, and the amount of the amended claim was for 24*l.* odd. The defendants paid into Court the sum of 20*l.*, and ultimately the case which was argued and tried was whether the amount paid into Court was or was not sufficient. We have nothing to do with what may be the inconvenience resulting from the decision of the Divisional Court. It may be necessary to make some alteration in the system which is carried on

(1) (1878) 3 Q. B. D. 534. (2) [1923] 2 K. B. 739.

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in the Port of London with reference to measuring timber cargoes and arriving at the amount of the dock dues actually payable. I say nothing about that. All we have to decide is what were the contractual rights of these parties.

The contract is contained in the bill of lading, which incorporated the conditions of the charterparty. The only material condition which it is necessary to consider is No. 12 : "If discharged in a dock in London the consignees to pay two-thirds of the dock dues." That condition applies merely to the dues in respect of discharge in a dock in London, and the consignees are to pay, not two-thirds of the amount which may be demanded of the shipowner, and which he pays bona fide, but two-thirds of the dock dues. It seems to me, in those circumstances, that when the shipowner comes to demand from the consignee the latter's proportion of the dock dues, the shipowner is under an obligation to show that the dock dues which were charged, and in respect of which he claims two-thirds, were dock dues properly charged.

I do not know that it is very clear, but the dock dues in respect of this vessel are, for the purposes of this case, said to be contained in that part of the Port of London Authority's rates on shipping which provides that vessels with part cargoes of wood and carrying no other cargo will be charged 3*d.* per ton on the net register and on the deck cargo space (if any) occupied, and 10*d.* per ton on the weight of the wood discharged.

Evidence was laid before the learned judge to the effect that in reference to soft wood cargoes the Port of London Authority have what is called by some of the witnesses a "rule of thumb" calculation, which adopts a weight of $2\frac{1}{2}$ tons for every standard of wood, and applies to all classes of soft wood, whether round timber or sawn timber. It was contended that that was a calculation which ought to be accepted, as I understand it, for all purposes in this case ; that is to say, not only for the calculation of the dock dues, but also for the apportionment as between the holders of the different bills of lading of the amounts properly payable.

It is material when a case is tried in the county court to ascertain what the points of law laid before the learned judge were ; what his decision upon them was, and what his findings, if any, upon questions of fact were ; because, in a case involving less than 50*l.* upon material questions of fact his findings are conclusive, and cannot be challenged. I have read the judgment of the learned judge of the Mayor's and City of London Court carefully for the purpose of satisfying myself whether he made any material finding of fact which would bind this Court. I can find none. It is difficult to be quite sure of the grounds upon which the learned judge came to his decision, and I agree with Hill J. that the conclusion which seems the most likely one is that the learned judge had in his mind that this general practice of measuring according to this rule of thumb calculation was so universally known that it had the effect of a custom. But that was no part of anybody's case, and it is not in this Court, or in the Court below, made a part of the case. I think myself that the points which have been argued here were really before the learned judge of the Mayor's and City of London Court, and were, therefore, proper subject matter of appeal to the Divisional Court.

I entirely accept the reasoning upon which Hill J. bases his judgment, and I cannot put it more clearly than he puts it. I will summarize what he says. He begins by pointing out that the basis of charge is wholly one of space. That, of course, has reference to so much of the charge as is in respect of registered tonnage. Then he goes on to say that, if a ship enters dock with a part cargo of wood and no other cargo, the dues were fixed upon a mixed basis : " The rate is 3*d.* per ton of the net tonnage of the ship with the addition of the deck cargo space—that is, a charge upon a basis of space tons—with a further rate of 10*d.* per ton upon the weight of the wood discharged—that is, a charge upon a basis, not of space tons, but of weight tons. With the 150 per cent. addition these rates are respectively 7½*d.* and 2*s.* 1*d.* As regards the 7½*d.* per space ton there is no difficulty in apportionment. Given the numbers of the space units of the

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several parcels the apportionment can be worked out as in the case of a ship with a full cargo. But the charge based upon weight tons discharged creates the difficulty illustrated by the present case. The Port of London Authority do not weigh—it is impracticable that they should. The shipowner does not weigh; his freight is payable per space unit. In general the consignees do not weigh. But the Port of London Authority has no power to charge the 2*s.* 1*d.*, otherwise than upon weight tons; and each consignee who has contracted to pay his proportion of two-thirds of what the shipowner has to pay, has contracted to pay his proportion of the 2*s.* 1*d.* charged upon a weight basis; that is to say, such part of the whole amount per ton weight discharged as the weight of his parcel bears to the total weight discharged, or, in other words, two-thirds of the 2*s.* 1*d.* per ton on the weight of his parcel. I can see no justification for apportioning upon a space basis a charge which can only be made upon a weight basis."

With that statement I entirely agree. The result is that it established the main part of the defendants' contention, and that is, that in respect of the greater portion of this charge it can only be apportioned as it is charged on a weight basis, and, without going into the figures in any detail—they have been closely gone into by Hill J.—it cannot be disputed, subject to a point to which I will refer in a moment, that if these dock dues are apportioned on a weight basis the amount paid into Court is sufficient.

The only other point is whether the weight should be 505 or 480 tons, or thereabouts, on which the dues are payable. Upon that again I agree with Hill J. There was no evidence that $2\frac{1}{2}$ tons was the equivalent in weight of a standard of this class of goods. It is practically nothing but a bad guess of what the real weight is likely to be, and the learned judge has shown that, upon the evidence, whether $2\frac{1}{2}$ tons or $2\frac{1}{4}$ tons is taken as representing a fathom, in either case it will work out at a figure which, if the dues are apportioned on a weight basis, will result in the amount paid into Court being sufficient. For these reasons I think that this

rather troublesome little case should be decided as Hill J. decided it in his judgment, and that the appeal must be dismissed, with costs.

SCRUTTON L.J. In this case the parties are fighting about 3*l.*, or thereabouts, but it is said to involve, and I dare say it does involve, very important consequences to the timber trade in London.

Certain consignees of parcels of soft timber have, under their bill of lading, incorporated a clause in the charterparty to this effect: "If discharged in a dock in London the consignees to pay two-thirds of the dock dues." That clause in itself is very obscure, particularly when applied to a case where the ship goes to another port as well as London. I think it means: "If discharged in dock in London, the consignees of the cargo discharged in London to pay two-thirds of the dock dues charged in respect of each consignee's own cargo."

If that be so, the next question is, what are the dock dues charged in respect of this particular consignee's cargo? Again, there is another obscure point. The Port of London rates provide, first, for rates on wood-laden vessels entering to discharge whole cargoes of wood (other than hard wood or furniture wood). The rate which the shipowner pays under that heading is a rate per ton net register of the ship. Then the rate provides for vessels with part cargoes of wood and carrying no other cargo. That again is very vaguely expressed, but I think it must mean "vessels with part cargoes of wood as above"—that is, excluding hard wood—"for discharge in London and carrying no cargo for discharge in London other than wood," and such vessels are to pay, not a rate per registered ton entirely, but 3*d.* per ton on the net register as against 1*s.* 1*d.* under the previous clause, and 10*d.* per ton on the weight of wood discharged.

The Port of London Authority, having that clause authorizing them to charge dues, find themselves and the trade in the position that nobody ever does weigh wood cargoes, and that, if they want dues on the weight of the

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cargo discharged, they will not get them by actual weighing, because nobody ever does it, and it is not very practicable to weigh all the wood as it comes out of a vessel. They appear therefore to have had recourse to a formula which can only be of any value if it enables them to ascertain the weight of the wood discharged. That is the only thing on which they are entitled to levy dues; they are not entitled to levy dues on the space which the wood occupies; it must be on the weight of the wood discharged. The formula which they use is one which starts from the fact, which may be, for aught I know, accurate, that a standard of wood weighs $2\frac{1}{2}$ tons, and, as I understand it, the St. Petersburg standard in timber measurement is applied to sawn wood. From that they assume that, because sawn wood may weigh $2\frac{1}{2}$ tons per standard, therefore round wood also weighs $2\frac{1}{2}$ tons per standard, although the term "standard" is not used in respect of round wood, but "fathom"; and that aspen wood also weighs $2\frac{1}{2}$ tons per standard, although the term "standard" is not used in respect of aspen wood, but the term "load." Thus, when the Port Authority get wood that is not sawn wood they reduce it to standard and then assume that the standard of aspen wood, or of round wood, weighs $2\frac{1}{2}$ tons. In that way they arrive at the weight, and claim on the ship. As between the Port Authority and the ship no question of apportionment arises. They claim dues on the ship for the whole of the cargo discharged in London.

It seems to be admitted, and it is clear on the evidence, that aspen wood and round wood do not weigh $2\frac{1}{2}$ tons per standard. Aspen wood weighs about a ton and a quarter per load, and round wood weighs $2\frac{1}{4}$ tons per fathom. If that is so, the Port Authority are, in order to ascertain the weight, using a formula which does not ascertain the weight in the case of goods other than sawn goods, and are charging dock dues on an alleged weight of timber which is not the real weight of the timber. They may have a rough and ready way of getting at it, but it is the real weight of the timber on which they must charge, so long as they keep to a rate which puts the rate on the weight of timber.

It is said by the shipowners who are claiming from the consignees repayment of the dock dues which they have paid to the Port Authority, that the learned judge of the Mayor's and City of London Court has found as a fact in the shipowners' favour and that the Court is bound by that finding of fact. That involves looking at the judgment of the learned judge to see what in fact he has decided. I have had great difficulty in making out what he has decided. But, so far as I can follow the judgment, I think the learned judge is saying this: "The defendants, the consignees, gave a good deal of evidence about the weight of the round wood and the aspen wood. The method of calculation is a rough-and-ready way of getting at it. No doubt it is substantially accurate, and I think that everybody who deals in wood must be taken to know the principle adopted at the docks. It may or may not be accurate, but it is the principle adopted at the docks, and the parties must be taken to have contracted in respect of it." I do not think that the judge has put it so high as saying that there is a custom. I think he has put it on the ground that if any one sends timber to the docks he must be taken to know that the weight would be ascertained in a particular way, and, whether it is right or wrong, he must be taken to have agreed to buy on the weight as ascertained in the way in which the Port Authority do ascertain it. I think that is what the learned judge's judgment comes to. If that is so, that is not a finding of fact; it is law, or the principle of assessment. I cannot find in this charterparty any obligation to pay dock dues as ascertained by the Port Authority in practice though that way of ascertaining them is wrong. The Port Authority are governed by statutory regulations as to what they may charge, and if the principle on which they proceed violates their statutory regulations, I do not see how the consignees can be bound to pay something which is contrary to the law governing the docks.

Secondly, there arises the question of the apportionment between the shipowners and the consignees, because in the view that I have taken of the charterparty each consignee is not liable to pay the whole two-thirds of the dock dues

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paid by the ship, but only his apportioned share. Two opposite views of the method of apportionment have been put forward by the two sides. The shipowners claim that the apportionment ought to be made on the space occupied by the goods; while, on the other hand, the consignees contend that the dues should be apportioned on weight. I agree with Hill J. that neither of those grounds can be supported, and the only way in which the matter can be dealt with properly, in my view, is the way adopted by Hill J.; that is to say, so far as these dock dues are charged on space, apportion those dock dues according to the space occupied; and so far as they are charged on weight, apportion those dues charged on weight according to the weight of the respective parcels.

Those are the principles on which I think this case should proceed, and that being so, it follows that I am entirely in accordance with the judgment of Hill J. The result of the figures is that the amount paid into Court by the consignees is sufficient, and it follows that this appeal must be dismissed.

ATKIN L.J. I agree. The Port of London Authority have a statutory power to charge dues, and the relevant dues in this particular case are based on weight. Therefore they must be ascertained by weight. It does not follow that because the Port Authority can only charge by weight that they have actually to put the goods on to a weighing machine, because weights can be ascertained by the well-known weights of certain commodities according to their measurement. It is quite a usual practice to ascertain the weight of different articles in commerce by reference to their measurement. The weight of liquids can be ascertained by reference to their liquid measure, and there are well-known formulæ for ascertaining the weights of other articles. The weight of a cubic foot of a great many articles is well ascertained; for example, the weight of a cubic foot of clay is very well ascertained for building purposes, and, provided that the weight is accurately ascertained in respect of those factors well known to science, the dues will be properly ascertained by the Port Authority. But the formula must be a correct formula—that is to say,

it must be sufficiently correct for business purposes, and accepted by persons engaged in the business as being correct.

Coming to the formula in this case, it is quite demonstrably absurd, because it is based on the idea that a cubic foot of solid material weighs the same as a cubic foot of material which is not solid, and has a large amount of air space in between; that is to say, a cubic foot of round materials stowed together. It appears from the evidence that the Port Authority are charging on the footing of 50 cwt. in the case of round wood, which in fact only weighs 38 cwt., and in the case of aspen wood, as against themselves they are treating it as weighing 50 cwt. when it in fact weighs 53 cwt. It is obvious that such a measure as that is an erroneous measure and cannot be treated as a proper exercise by the Port Authority of their statutory power to charge on weight. They are charging on something which is not weight.

Those facts were before the learned judge of the Mayor's and City of London Court, and it appears to me that there was no evidence before him on which he could find that the weight of the goods in question—either the round wood or the aspen wood—was in fact properly ascertained by taking $2\frac{1}{2}$ tons to the standard. That appears to me to be the material part of this case. With regard to everything else that has been said in the judgment of Hill J. I entirely agree. I think he proceeded on a right footing, and it follows, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Botterell & Roche.*

Solicitors for the respondents: *Trinder, Kekewich & Co.*

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[IN THE COURT OF APPEAL.]

THE JUPITER.

Shipping—Possession of Vessel—Writ in rem—Intervention by Sovereign State to set aside Writ—Right to Possession by Sovereign State in Dispute—Comity of Nations—Immunity from legal Process.

The plaintiffs, a foreign company, issued a writ in rem claiming possession of the steamship *Jupiter*. The writ was directed against "the steamship *Jupiter* and all persons claiming any right or interest in the said steamship." The Union of Socialist Soviet Republics entered an appearance under protest and moved to set the writ aside on the ground that the ship was the property of the Union, a recognized independent sovereign State:—

Held, that the issue of a writ in rem against a vessel in which a foreign sovereign State claimed an interest was in effect impleading the sovereign State, and, although the right of the sovereign State to possession of the vessel was in dispute, the Court could not investigate the facts, and the writ must be set aside.

APPEAL from a decision of Hill J. on an application to set aside a writ in rem.

The Union of Socialist Soviet Republics moved to set aside the writ and all subsequent proceedings in an action instituted by the Compagnie Russe de Navigation à Vapeur et de Commerce claiming, as sole owners of the steamship *Jupiter*, to have possession of the vessel decreed to them. The writ was addressed to "the steamship *Jupiter* and all persons claiming any right or interest in the said steamship."

The ground of the motion was that the interveners, a recognized sovereign independent State, were the owners of the vessel under a decree of nationalization of January 26, 1918, nationalizing the Russian mercantile marine, and that as a sovereign State they declined to sanction the proceedings.

From the affidavits filed on behalf of the plaintiffs, however, it appeared that the plaintiffs, whose head office had been at Petrograd with a trading centre at Odessa, owned the *Jupiter* and a number of other ships. In 1919 they moved their ships and staff to Marseilles, and since that date they had traded entirely from Marseilles. When freights became unprofitable the *Jupiter* was laid up in Dartmouth harbour.

She still flew the old flag of the Russian mercantile marine and was in charge of a master, mate and engineer, whose wages were paid by the plaintiffs.

In March, 1924, the plaintiffs alleged that the master became false to his trust, declined any longer to recognize the ownership of the plaintiffs, and handed over the ship's papers to the Trade Delegation of the Soviet Republics in London, which issued a fresh registration for the vessel. The plaintiffs thereupon issued their writ in rem claiming a decree of possession.

Hill J. read the following judgment: By writ in rem dated March 26, 1924, and amended on April 14, 1924, the plaintiffs sue, as Compagnie Russe de Navigation à Vapeur et de Commerce, the owners of the steamship *Jupiter*, and give their address in the words: "Whose head office is at 255, Rue St. Honoré, Paris, in the Republic of France." The writ is in rem against "the steamship *Jupiter* and all persons claiming any right or interest in the said steamship." The *Jupiter* is described as "of the port of Odessa." The claim indorsed is as follows: "The plaintiffs, as sole owners of the steamship *Jupiter*, of the port of Odessa, claim to have possession decreed to them of the said vessel." No warrant of arrest has been applied for. The writ having been served on the *Jupiter*, which was lying at Dartmouth, an appearance under protest was entered on April 2, 1924, by "the Union of Socialist Soviet Republics." On April 9, 1924, notice of motion to set aside the writ was given by "the Union of Socialist Soviet Republics." The grounds of the application as stated in the motion are, "that the steamship *Jupiter* is the property of the Union of Socialist Soviet Republics, a recognized foreign independent State, and that the said State declines to sanction the institution of these proceedings in this Court."

A number of affidavits were filed, and on one of them, sworn by the master, Captain Lepine, the plaintiffs cross-examined the master. In my judgment, however, the facts on which this motion must be decided are few and simple, and beyond dispute:—

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(1.) As admitted, and as shown by the letter of the Foreign Office addressed to the solicitors of the Union, and the documents sent therewith, the Crown, the sovereign of this Court, recognizes the Union of Socialist Soviet Republics as the de jure rulers of those territories of the old Russian Empire which acknowledge their authority. I am bound, therefore, to treat the Union as an independent sovereign;

(2.) As appears from the affidavit of M. Rakovsky, the Chargé d'Affaires in Great Britain for the Union, the Ukranian Socialist Soviet Republic is one of the members of the Union. It is not disputed that Odessa is in the territory of the Ukranian Socialist Soviet Republic, and that the Ukraine, including Odessa, formed part of the territories of the old Russian Empire. It follows that Odessa is within the territorial sovereignty of the Union, and that the *Jupiter*, which the plaintiffs say is of the port of Odessa, is a ship of which the port of registry is within the territorial sovereignty of the Union. The Union is the Russian sovereign and the *Jupiter* is a Russian ship.

(3.) M. Rakovsky, as Chargé d'Affaires in Great Britain for the Union, asserts in his affidavit that the Union "is entitled to the ownership" of the Jupiter. It is clear from the rest of the affidavit that by "entitled to the ownership" is meant "is the owner." In the affidavit of M. Rabinovitch it is stated that the *Jupiter* "is the property" of the Union. The motion to set aside the writ is based on the assertion that the *Jupiter* is the property of the Union.

(4.) The writ is a writ in rem—that is to say, it is a writ directed primarily against the ship, and accordingly, through the ship, against all persons claiming any right or interest in the ship. If the writ stands and there were no appearance and judgment by default, the judgment, whatever else it decreed, would condemn the ship in costs. This is enough to show that a writ in rem, whatever the relief claimed, is a writ directed against the property in the ship. It is also a writ which compels the owner either to appear and submit to the jurisdiction or to allow judgment against his property to go by default. In these circumstances, the ship being

Russian and the Russian sovereign asserting property in her, and being unwilling to submit to the jurisdiction of the Court, this Court has no jurisdiction to entertain proceedings against that property or to investigate the assertion that the ship is the property of the Russian sovereign.

The judgment of Scrutton L.J. in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1) applies, substituting " which is registered in a port in its own territory " for " which it exported from its own territory "—namely, " If M. Krassin had brought these goods with him into England, and declared on behalf of his Government that they were the property of the Russian Government, in my view no English Court could investigate the truth of that statement," and, again, " I cannot conceive the Court's investigating the truth of its allegation that the goods in question, which it exported from its own territory, are its public property": see also *Vavasseur* v. *Krupp.* (2)

That I may not be misunderstood, I should add that I am here dealing with a ship of which the port is, by admission, Odessa. I am not deciding whether I should be bound by the assertion of the Government of the Union in respect of a ship which was not Russian, as, for instance, if the *Jupiter* had acquired a French registry, supposing such a thing to have been possible. My decision relates to a ship which is Russian, and, therefore, prima facie, subject to Russian law with regard to title and transfers of ownership.

Such being the grounds of my decision, I will only add that most of the arguments addressed to me and a great part of the affidavits are irrelevant to the only issue before me. I cannot go into the merits of the question whether the nationalization decree of January 26, 1918, applied, or has since been applied to the *Jupiter*. Nor, on the other hand, is it material to consider whether the master, who was custodian for the plaintiffs, rightfully or effectively transferred possession to the Union. Mr. Jowitt contended that the plaintiffs for the purposes of this action were not concerned with the property in the ship—they only wanted to be put in actual

(1) [1921] 3 K. B. 532, 555. (2) (1878) 9 Ch. D. 351.

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possession of the ship of which they had never lost the right to possession. But they are seeking an order for possession by a proceeding in rem, a proceeding against the property. It is quite immaterial what the relief claimed may be. The material consideration is that the action is in rem against a ship, the property in which is asserted by an independent sovereign, recognized as such by the Crown, to be in that independent sovereign, the ship being registered in or belonging to a port within the territory of that independent sovereign. For these reasons I must grant the motion and set aside the writ, with costs. Leave to appeal.

W. A. Jowitt K.C. and *Langton* for the appellants. With the possible exception of *The Annette* (1), where different considerations arose, in none of the cases dealing with the immunity of the property of sovereign States from legal process has the right of the sovereign State to the ownership or possession of the property been in dispute. All that the plaintiffs want is a declaration that they are entitled to possession. The writ is not directed to the Soviet Republics and they are not thereby impleaded. The plaintiffs are not seeking in the present proceedings to deprive the Soviet Government of their alleged ownership. The master by being treacherous to his employers cannot alter their de jure possession. The comity of nations has nothing to do with a foreign Government which founds its case on a dishonest act of a servant against his master. Acts of sovereignty cannot be exercised in the territorial waters of another sovereign : *The Santissima Trinidad* (2) ; a sovereign State cannot even requisition its own vessels except in its own waters : *Russian Bank for Foreign Trade* v. *Excess Insurance Co.* (3) The fact that the vessel is now flying the Soviet flag is not conclusive : see the observations of Brett L.J. in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (4) The old Russian flag was still recognized in France at the material time. Although precluded, having

(1) [1919] P. 105.
(2) (1822) 20 U. S. 283, 352.
(3) [1918] 2 K. B. 123.
(4) (1883) 10 Q. B. D. 521, 535.

regard to the decisions in *The Parlement Belge* (1) and *The Porto Alexandre* (2), from raising the question in this Court that not being destined for the public use a State-owned vessel is not entitled to exemption from arrest, the appellants wish to keep this point open.

[*The Gagara* (3) and *The Tervaete* (4) were also referred to.]

C. R. Dunlop K.C. and *Dumas* for the respondents were not called on.

BANKES L.J. This appeal raises the question whether or not the learned judge was right in setting aside a writ in an action in rem which the plaintiffs, a French company describing themselves as the owners of the steamship *Jupiter*, issued against "the steamship *Jupiter* and all persons claiming any right or interest in the said steamship."

We know from the affidavits the circumstances under which the plaintiffs are claiming that this vessel is their property. In order to assert that claim they have elected to take proceedings in rem. It is a procedure in which the writ is directed to all persons claiming any right or interest in the steamship; and the only persons who have appeared are the Soviet Government, who claim to be the owners of the vessel, and who protest against the exercise by the Courts of this country of any jurisdiction over them, and they appear under protest.

The motion to set aside the writ was served, and came before Hill J., and he has set aside the writ, in my opinion rightly and on the grounds which he expressed, I think quite accurately, in *The Gagara*.(5) In that case the action was commenced in rem, and the effect of the action is described by the learned judge in these words: "In the first place," he says, "the Esthonian Government is in actual possession of the ship, and that Government states that the ship is being used by it for public purposes. The plaintiffs invite the Court to take that possession away by arrest of the ship and ultimately by decree to transfer it to the plaintiffs"—in

(1) (1880) 5 P. D. 197.
(2) [1920] P. 30.
(3) [1919] P. 95.
(4) [1922] P. 259.
(5) [1919] P. 95, 101.

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substance that is exactly what the plaintiffs are seeking to do here. "But to permit the arrest is to compel the Esthonian Government either to submit to the jurisdiction of the Court or to lose their de facto possession, and to compel the Esthonian Government to submit to this Court the question of the ownership of the *Gagara*."

In my opinion, that is contrary to all the principles upon which this Court has acted where a claim is made by a duly recognized independent sovereign State. It seems to me that the necessary result of these proceedings is to call upon the Soviet Government to assert its title, and to have the question of the ownership, or the right to possession of this vessel, litigated in the Courts of this country. That is not admissible. I think the judgment of Hill J. is quite right, though I do not attach the importance which he does to the fact that this vessel was registered at Odessa.

SCRUTTON L.J. A writ in rem is issued by a company with a French name, which at any rate is not a company registered under the English Companies Acts, addressed to the steamship *Jupiter*, which is a steamship now lying in English waters, and "all persons claiming any right or interest in the said steamship." Whereupon an application is made to this Court by the Union of Socialist Soviet Republics to set aside the writ on the ground that the *Jupiter* is the property of the Union, a recognized foreign independent State. It is agreed that the Union has been recognized de jure and de facto by the British Government. It appears to me without going any further, without investigating whether the claim is good or bad, that the Court, on having that statement made to it, must decline jurisdiction.

There used to be some obscurity as to the nature of a writ in rem in Admiralty, but since the judgment of Sir Francis Jeune in *The Dictator* (1), which was affirmed by this Court in *The Gemma* (2), that obscurity has been cleared up. By the old practice of the Admiralty Court the appearance of a person interested in property used to be enforced

(1) [1892] P. 304. (2) [1899] P. 285.

either by seizing him to make him appear, or by seizing his ship, or by seizing his property other than his ship; but the object of all the processes of seizing was to make the man appear so that he might be a personal defendant to the action. If he did appear, he at once became personally liable to the judgment of the Court. If he did not appear, the Court, having given him the opportunity of appearing, might take away his property. This writ being addressed to the steamship *Jupiter* and all persons claiming any right or interest in the steamship, the foreign Government which does claim a right or interest in the ship must do one of three things. First, it may appear to defend, but it cannot be compelled to appear; secondly, if it were not to appear and let the action go on, the Court might feel able to forfeit the property of a foreign sovereign; thirdly, it can come to the Court and say, "I am not going to discuss what my title is; I say I am a foreign sovereign; I claim a right in this property, and you cannot compel me to come to your Court to show you that I have good cause for saying that it is my property."

I think that the law is accurately stated by Mr. Dicey. He says: "The Court has no jurisdiction to entertain an action against any foreign sovereign. Any action against the property of a foreign sovereign is an action or proceeding against such person": Conflict of Laws, 3rd ed., p. 215. On that ground, without going into any discussion as to whether the claim is right or wrong, without basing my decision on the fact that the port of registry of the ship is Odessa, without discussing whether the result at which the plaintiffs in this case are aiming can be achieved by another method, this particular method appears to me to violate the principles of international comity and to make a foreign sovereign appear in these Courts as defendant to defend what he alleges to be his property. Consequently the writ should be set aside.

I desire to reserve the question whether under any circumstances the Admiralty Court would entertain an action for possession between foreigners except in a case where the foreign sovereign consented. The matter is discussed

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in *The Annette* (1), where the foreign sovereign consented because he was one of the parties; but according to the old practice of the Court I do not think that the Admiralty Court would have tried such an action. However, I am content to rest my decision in this case on the fact that this writ requires a foreign sovereign to appear in these Courts to defend what he alleges to be his property, and by the principles of international comity the Courts of this kingdom do not allow such steps to be taken against foreign sovereigns.

ATKIN L.J. The plaintiffs are a company who appear to have been registered in Russia and to have had property at one time in a ship called the *Jupiter*. The *Jupiter* was registered at the port of Odessa—though this appears to me to be quite an irrelevant fact. She left Odessa in 1919 and since then has been in waters other than Russian territorial waters in the possession of the plaintiffs through their servant, the master of the ship, and for the last year or year and a half has, in fact, been lying in British territorial waters at Dartmouth. It appears that at the beginning of this year the Russian Soviet Government induced the master of the ship to repudiate the possession and ownership of the plaintiffs and to hold the ship for them, and the master procured a provisional registration from the Russian Consul, which is a different registration from the registration at Odessa.

Those being the facts, the plaintiffs issued their writ in rem against the steamship *Jupiter* and all persons claiming any right or interest in the said steamship. It is plain from these facts (*a*) that the plaintiffs intended "all persons claiming any right or interest" in the ship to include the right of the Russian Soviet Government, who are the only people who claim to have any rights and whose claim has given rise to these proceedings; and (*b*) it is certain that "all persons claiming any right or interest" in the ship did in fact include the Russian Soviet Government. Therefore, it is plain to my mind that this writ, so addressed to these persons and

(1) [1919] P. 105.

commanding them within eight days after the service of the writ to cause an appearance to be entered, is a writ by which the British Courts purport to exercise jurisdiction over a sovereign independent State. It also is clear upon the authorities that the British Courts have no jurisdiction to do any such thing, and that when such a writ is issued it is the right of a foreign sovereign in these Courts to apply to have that writ set aside.

It is on these simple grounds that I, and I think the rest of the Court, determine this appeal. We do not determine it on the footing that this ship is in fact the property of the Russian Soviet Government. That may or may not be the fact. We do not determine it on the ground that as the Russian Soviet Government claims the ship as their property, this is conclusive proof in these Courts that it is their property. These questions do not appear to me to be necessary for the decision of this appeal. I decide it on the sole ground that this process, by the very nature of it, is an attempt to implead the Russian Soviet Government, and the Court has no jurisdiction to do that. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondents: *Wynne, Baxter & Keeble.*

E. C. M. T.

1924
July 23,
24, 30.

ADMIRALTY.

THE GRIT.

Shipping—Damage at Berth—No Charge by Wharfowners for Use of Berth—Apprehensions of Shipowner's Agent as to possible dangerous Condition of the Berth—Duty to warn.

The plaintiffs' motor barge received damage by taking the ground on some large stones in a berth alongside the defendants' wharf at K., where she was loading a cargo of slag. The defendants, a railway company, owned the wharf, but not the bed of the river alongside the wharf, and they charged no dues in respect of the use of the wharf. The arrangements for the cargo to be loaded into the barge at the wharf were made by W., who was the collector of dues for the Humber Conservancy Board at K., and had an office on the wharf. W. acted as agent for both the plaintiffs and the shippers of the cargo, and told the defendants' station-master at K. that the barge was coming to load a cargo of slag. The cargo was carried over the defendants' line of railway to K. A year previously W. had warned the defendants that the berth might be dangerous to vessels using it owing to stones, placed to protect the river bank, falling into the bed of the river. The defendants took some soundings, but did nothing else:—

Held, (1.) that, although the defendants did not charge dues for the use of the wharf, they derived benefit therefrom by reason of the freight earned for the land carriage of the cargo, and that they were in the position of persons who had invited vessels to use the wharf; that they owed a duty, therefore, if they had not taken steps to see that the berth alongside the wharf was safe for vessels to ground in, to warn that they had not done so.

(2.) That although the person to whom the warning should have been given was W., he was entitled to assume that the defendants were satisfied with their soundings and that the risk of stones reaching the berth had not passed from risk to fact; that accordingly the plaintiffs, through W., were still entitled to a warning that the defendants had not taken reasonable care to see that the berth was safe, and that such knowledge and apprehension as W. had, did not affect the plaintiffs' right to recover from the defendants the amount of the damage sustained by the barge.

Action of Damage.

The plaintiffs, F. T. Everard & Sons, Ld., were the owners of the motor barge *Grit*; the defendants were the London and North Eastern Railway Co., the owners of a wharf at Keadby on the River Trent. The plaintiffs alleged that the barge received damage by grounding on stones in the berth alongside the wharf. The defendants denied that they invited the barge to come to the berth or that it was unfit. They charged

no dues for the use of the wharf, and they alleged that they owed the plaintiffs no duty, or, that if they did they had fulfilled it. The facts are summarized in the headnote and are fully set out in the judgment.

Raeburn K.C. and *Dumas* for the plaintiffs. Although the defendants took no dues for the use of the wharf the reward to them was in respect of freight for the land carriage of cargoes over their railway. There was an implied invitation on their part to vessels to come to the wharf, and they are in the position, therefore, of the wharfingers in *The Bearn*. (1) They had not taken reasonable care to see that the berth alongside their jetty was reasonably safe for vessels to ground on, and their duty was at least to warn that they had not done so: *The Moorcock*. (2) None of the reported cases however lay it down that a mere warning that they have taken no steps is sufficient compliance with the obligation which wharfingers owe to persons whom they invite to their wharf. Collins M.R. in *The Bearn* (1) says: "It is the low water mark" of liability. Their duty is to take reasonable care: cf. *Mersey Docks Trustees* v. *Gibbs*. (3)

[HILL J. Suppose the plaintiffs already knew, or should have known, through their agent Wharton, the condition of the berth even better than the defendants did?]

Warning should have been given to the master of the *Grit*. Wharton was merely the ship's broker; it was not his business to put himself in the position of an invitee. The maxim "Volenti non fit injuria" does not apply, for it cannot be suggested that the shipowners consented to run the risk, and it was not within the scope of Wharton's authority to bind the shipowner to any such agreement: see as to "Volenti non fit injuria" *Smith* v. *Baker & Sons* (4); see also *Baker* v. *James Bros. & Sons*. (5) In fact Wharton did not know that the defendants had done nothing beyond taking a few soundings in September, 1923, and he was entitled to assume that the defendants were satisfied that the berth was safe.

(1) [1906] P. 48, 76.
(2) (1889) 14 P. D. 64, 70.
(3) (1866) L. R. 1 H. L. 93.
(4) [1891] A. C. 325.
(5) [1921] 2 K. B. 674.

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[Reference was also made to *River Wear Commissioners* v. *Adamson* (1) and *The Calliope.* (2)]

Bateson K.C. and *J. B. Aspinall* for the defendants. The defendants took no fee or reward for the use of the wharf, and that differentiates the case from all the reported decisions. The plaintiffs are seeking to put a far higher duty on wharfingers than has as yet been laid down. The defendants did not invite the *Grit* to the wharf, they did not moor her, and they did not know she would take the ground. If in fact the berth was bad (which the defendants deny) the plaintiffs, through their agent Wharton, knew everything that it was the defendants' duty to tell them. The maxim "Volenti non fit injuria" applies. Lord Watson in *Smith* v. *Baker & Sons* (3), in dealing with the case of a workman injuring himself while using a defective machine, said: "If he clearly foresaw the likelihood of such a result and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as 'volens.'" The ratio decidendi in *The Moorcock* (4) and the later cases following that decision is that the wharfinger knew or ought to have known the condition of the berth, and the plaintiffs did not know and were therefore entitled to a warning.

[*The Empress* (5) was also referred to.]

Raeburn K.C. in reply. In *The Bearn* (6) no one took the point that the knowledge of the pilots was the knowledge of the shipowner. Wharton could not be sued by the shipowners for breach of duty in not giving them such information as he had as to the condition of the berth.

In addition, the plaintiffs have a cause of action founded on nuisance. The defendants permitted the navigable channel to become a danger to vessels using the river owing to the presence of large stones which came from the river bank belonging to the defendants.

Cur. adv. vult.

(1) (1877) 2 App. Cas. 743.
(2) [1891] A. C. 11.
(3) [1891] A. C. 325, 357.
(4) 14 P. D. 64.
(5) [1923] P. 96.
(6) [1906] P. 48, 76.

July 30. HILL J. read the following judgment : The plaintiffs are the owners of the motor barge *Grit*. The defendants own a wharf at Keadby on the River Trent. The plaintiffs complain that by reason of inequalities in the berth alongside the wharf on which the *Grit* took the ground after her loading was completed on the evening of August 21, 1923, she received damage, and they contend that the defendants failed in their duty to the plaintiffs as regards the safety of the berth. The defendants deny that the *Grit* sustained damage in the berth and deny that the berth was unfit, and say that they owed no duty to the plaintiffs, or, if they did, it was fulfilled.

The case raises questions of fact and questions of law. First, as to the facts. The *Grit* is a motor barge of 193 gross tonnage, 105 ft. long, 23 ft. 6 ins. beam ; flat bottomed, with machinery aft, with two hatches and loaded draught 9 ft. 6 ins. aft and about 9 ft. forward. Her frames and side plankings were of oak ; chimes and keel of elm. She was strongly built, and so constructed as to be able with safety to take the ground laden. She was completed in 1923. She carried a cargo of wine from London to Norwich, and thence came to Keadby to load basic slag in bags. The wharf at Keadby belonging to the defendants adjoins the goods yard at Keadby station. It is a pile wharf, 210 ft. long, and the northern or down river half of it is sometimes spoken of as the jetty. When I use the word "jetty" I refer to the northern half. A short distance to the south of the jetty is a coal tippler, up which trucks of coal are brought, so that the coal can be tipped into vessels which lie at the wharf. I refer to it as the tippler to distinguish it from the movable shoot hereafter to be mentioned. This tippler was in evidence sometimes spoken of as the shoot. The shipments at Keadby are chiefly of coal. In addition, a certain quantity of basic slag is shipped. Whether coal or slag, it is brought to Keadby by the defendants along their railway. When coal is shipped the defendants' men bring the coal to the tippler and tip it into the vessel. When basic slag is shipped defendants' men bring the truck to the

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tippler, and the defendants provide movable shoots whereby men employed by the shipper or ship move the bags from truck to quay and from quay to ship. [His Lordship dealt in detail with the evidence as regards the position taken up by the *Grit*, the damage received by her, and the defendants' contention that she was aground on August 23 on Hessle Sands, an allegation which he found was not established. He said that the evidence on both sides was that the damage to the ship and also to her machinery was consistent with sitting on stones in the berth. His Lordship continued as follows :]

As to the berth. It was surveyed by the plaintiffs early in September, 1923. At two places stones projecting above the bed were found, and in addition there were several stones or hard substances embedded in the berth. Mr. Kirk, who surveyed for the Humber Conservancy Board, found hard material, slag or stones, and a small part also of coal tipped. A consultation followed between the defendants and the Humber Conservancy Board, which resulted in the defendants in January, 1924, dredging the berth and removing a very large number of stones as well as sand. There can be no doubt that there were a great many stones in the berth and that some were projecting. The positions of these projecting stones found by the surveyors are shown on the plan put in. One was 17 ft. forward and the other group 45 ft. forward of the place where the master said the stern of the *Grit* in the second position had been. It is impossible to fix the position absolutely to a foot or two. I am advised that the damage found may well have been caused by the berth as found, and I find that it was. I find also that it happened on the night of August 21–22 after the loading had been completed. There is no doubt how the stone got into the berth. Below, or to the northward of the north end of the jetty the river bank had been made up by tipping slag down it. It was in controversy whether this work below the north end of the jetty was done by the railway company or by the Board of Agriculture. I am, upon the evidence, unable to find that it was done by the defendants and not by the Board of

Agriculture. I cannot therefore find that the defendants created a nuisance upon the highway of the river. But that the stone came from the bank is clear. In the Trent there is a very strong flood tide. In course of time much of the stone slipped down into the bed of the river and disappeared. Mr. Wharton, who among other things was collector of dues for the Humber Conservancy Board at Keadby, with an office on the wharf, said that when the stone was first placed to protect the bank he pointed out that it might cause obstruction. By 1922 he said the greater part of the stone had disappeared into the river bed. On July 13, 1922, he wrote to the railway company as follows : " Referring to conversation re depth of water at the Keadby Trent jetty I find that there is only 4 to 5 ft. of water at the north end of this jetty at low tide. This is chiefly owing to the large stones rolling into the river when repairing the Trent bank. Consequently those stones are very dangerous to those vessels which are now loading, grounding on those stones. Will you be good enough to give this prompt attention otherwise we may have a serious accident as those stones are liable to hole a vessel's bottom when loaded ? " It is admitted that nothing in the way of dredging was done till 1924. I have no doubt that Mr. Wharton is right in thinking that the stones which by August, 1923, were in the berth alongside the wharf came from the bank below the north end of the jetty. I find in fact that on August 21, 1923, the berth was unfit for the *Grit*.

To determine liability I have to state one other fact. Mr. Wharton acted as agent for both shipowners and shippers to see that the ship received the cargo at the wharf. He told the stationmaster, who controlled the wharf on the defendants' behalf, that the *Grit* was coming for the cargo, and asked him to see that the cargo was brought down to the wharf for the ship. No one else on behalf of the owners of the *Grit* had any communication with the defendants. The position then is this : The defendants own a wharf and a railway line. They carry goods to the wharf, and are paid for the carriage. They make no charge for the use of the wharf or the loading appliances at the wharf and take no

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part in the work of loading. Mr. Wharton, who is agent both of the ship and the shippers to see that the ship receives the cargo at the wharf, tells the railway company's servant who has control of the wharf that the ship is coming to the wharf, and asks him to see that the cargo is sent forward by the railway. The railway company's servant assents to the ship coming and sees that the cargo arrives—i.e., he agrees that the ship shall load the cargo at the wharf. In such circumstances the shipowner is not a mere licensee, any more than the cargo owner. Both are using the railway company's wharf not only for their own purposes and benefit, but also for the purposes and benefit of the railway company—that is, so that the railway company may earn the freight for the land carriage of the cargo. What difference can it make, qua the shipowner, if the wharfowner charges shipping dues upon the goods ? And, apart from the fact that the railway company did not charge the goods for any wharf service, the facts are as in *The Bearn*. (1) It is nothing to the point that the wharf is not a profitable part of the railway company's undertaking. In my judgment the defendants did invite the *Grit* to load at the wharf and came under the liabilities of those who own a wharf but not the bed of the river alongside the wharf, and invite ships to load at the wharf. Further, the defendants knew that ships which loaded at the wharf often did take the ground and, by their servant the station-master, knew that the *Grit* was of a size to take a cargo of 280 tons, and they knew, or ought to have known, that the *Grit* was likely in the ordinary course to take the ground. Their duty therefore extended to the safety of the ship as a ship which might take the ground when alongside the wharf. The duty is defined in *The Moorcock*. (2) In that case Bowen L.J. said : " I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not

(1) [1906] P. 48. (2) 14 P. D. 64, 70.

done so": compare *The Bearn.* (1) In fact, the railway company had taken no steps to make the berth safe. They had taken no adequate steps to see whether the berth was safe. I say no adequate steps, because they had from time to time made some inspection of the berth. The defendants' evidence was one a year or twice in two years. Mr. Wharton said that time after time he pointed out to the defendants' servants that the stone was coming into the river and washing alongside the jetty. He said that after his letter of July, 1922, some railway men examined the wharf. A plan was put in by defendants showing soundings taken on August 17, 1922. There are only six lines of soundings in the whole 210 ft. of wharf and jetty. In the berth occupied by the *Grit* the soundings along the centre line showed 11 ft. forward, then 9 ft. 9 ins. about amidships, then 10 ft. aft. The draughtsman who took the soundings never discovered the stones. The defendants gave no warning that they had made no proper examination.

This brings me to the matter which has given me some trouble. The duty was to warn. But when the negligence alleged is a failure to give information, the knowledge or absence of knowledge on the part of the shipowners must be a material circumstance. The judgments in *The Moorcock* (2) and *The Bearn* (3) emphasize the point that the shipowner had no knowledge as to what steps had been taken by the wharfowner and knew nothing about the berth. In the present case however Mr. Wharton did the ship's business at Keadby, such as it was. The plaintiffs rely, and have to rely, upon invitation. The person to whom the invitation on behalf of the plaintiffs was given was Mr. Wharton—the invitation was implied in the arrangements made between him and the stationmaster. Being the person who sought and obtained the invitation, Mr. Wharton was the person to whom on behalf of the plaintiffs the warning should have been given. I therefore think that I must consider the knowledge or absence of knowledge of Mr. Wharton. At one time I was

(1) [1906] P. 48, 76. (2) 14 P. D. 64.

(3) [1906] P. 48.

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inclined to think that Mr. Wharton knew so much, and had himself given to the railway company such warnings of the risks to the berth, that it could not be negligence on the part of the railway company to fail to re-echo to Mr. Wharton warnings which he had himself given. But, on consideration, I think that would not be sound. Mr. Wharton did give warnings, but he knew that the railway company thereafter took soundings. He was not to know that they had taken them in a very inadequate manner. He was, in the absence of any further communication by the railway company, entitled to assume that they were satisfied by their soundings that the berth was reasonably safe, and that the risk of stones reaching the berth, which he apprehended, had not yet passed from risk to fact. The plaintiffs, through Mr. Wharton, were still entitled to a warning that the defendants had not taken reasonable care to see that the berth was safe and at least to be told the extent and results of the examination on August 17th, 1922.

I therefore come to the conclusion that such knowledge and apprehension as Mr. Wharton had does not, in this case, affect the plaintiffs' rights. There will be judgment for the plaintiffs with costs.

Solicitors for the plaintiffs: *Holman, Fenwick & Willan.*
Solicitor for the defendants: *Thomas Chew.*

E. C. M. T.

DIVORCE.

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July 31.

ANDREWS *v.* ANDREWS AND CHALMERS.

Divorce—Adultery—Evidence—Birth of Child conceived during Existence of Order for judicial Separation—Presumption of Non-access of Husband—Wife's Admission of Adultery.

The old rule of the Ecclesiastical Courts, which assumed that husband and wife have no access during the existence of a divorce a mensa et thoro, applies to the case of a magistrates' separation order under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), which contains the usual clause that the wife shall not be bound to cohabit with her husband. If, therefore, a child is born which must have been conceived during the existence of such an order, the rule laid down in *Russell* v. *Russell* [1924] A. C. 687 does not apply, and the husband may obtain a divorce without other evidence than the wife's admission.

THE parties were married on October 11, 1916, and there was one child of the marriage. The husband served in the Marine Light Infantry and was abroad on active service during the greater part of the years 1917–1918, but returned to his wife on December 7, 1918. Shortly after Christmas in that year the wife left her husband and they had not afterwards lived together. On January 17, 1921, the wife obtained a separation order from the magistrates, and the husband was ordered to pay 15*s.* a week for the maintenance of her and her child. On November 13, 1922, this order was discharged on the ground of the wife's adultery, proved only by her own confession in a letter to her husband. On December 27, 1922, the wife gave birth to a child which she herself registered, giving the name of Chalmers, the co-respondent, as the father. The husband then filed this petition for a divorce.

Clifford Mortimer for the petitioner. There is no direct evidence of the wife's adultery except her confession that the co-respondent was the father of her child. That appears to bring the case within the difficulty raised by *Russell* v. *Russell*. (1) But at the time the child must have been

(1) [1924] A. C. 687.

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conceived the magistrates' separation order was in force. The case of *Hetherington* v. *Hetherington* (1) shows that the old rule of the Ecclesiastical Courts, that if a child was conceived while a divorce a mensa et thoro was in force the presumption was in favour of bastardy, as laid down in *Inter the Parishes of St. George and St. Margaret's, Westminster* (2), applies to a modern separation order. The case of *Hetherington* v. *Hetherington* (1) was distinguished and approved by Lord Finlay in his judgment in *Russell* v. *Russell*. (3)

HORRIDGE J. accepted Mr. Mortimer's argument and made the decree nisi.

Solicitors: *H. B. Sewell & Son.*

J. R. B.

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June 17, 19.

[DIVORCE.]

BOWRON *v.* BOWRON.

Husband and Wife—Appeal from Justices—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 8—*Desertion—Persistent Cruelty or Neglect to maintain—Complaint of Cruelty or Neglect barred by Time—Setting up same Matter as constructive Desertion.*

Although desertion is a continuing offence under the Divorce Acts, a wife cannot obtain relief for constructive desertion, on the ground of cruelty which caused her to leave her husband, under the Summary Jurisdiction (Married Women) Act, 1895, when the remedy for the acts of cruelty complained of is barred by lapse of time by the provisions of the Summary Jurisdiction Acts.

APPEAL from the justices of Penge, Kent.

In this case the wife had taken out two summonses against her husband. The first, dated April 10, 1924, charged him with having been guilty of persistent cruelty to her and wilful neglect to provide reasonable maintenance and having by such neglect caused her to leave him. On April 12, 1924,

(1) (1887) 12 P. D. 112. (2) (1705) 1 Salk. 123.
(3) [1924] A. C. 687.

she took out another summons charging him with desertion. Both summonses came before the justices on May 20, 1924. The first was withdrawn on the ground that the acts of cruelty and neglect to maintain were all prior to February 27, 1923, on which day the wife was compelled to leave her husband, and the summons was therefore clearly out of time under s. 8 of the Act, which provides that all applications under this Act shall be made in accordance with the Summary Jurisdiction Acts.

The desertion complained of by the second summons was a constructive desertion on the same February 27, 1923, consisting in the wife having been compelled to leave her husband by the same acts of cruelty as were mentioned in the first.

On the second summons the justices found the husband guilty of desertion and ordered him to pay maintenance at the rate of 1*l.* a week for the wife and 5*s.* for the child, holding that desertion was a continuing offence, and proceedings were not therefore barred by the delay.

The husband appealed.

L. W. J. Costello for the appellant. The charge of neglecting to maintain a wife or children is one which under the Summary Jurisdiction Acts, brought into this Act by s. 8, must be complained of within six months. The wife was therefore out of time in respect of that complaint. The justices have endeavoured to get out of this difficulty by finding the husband guilty of desertion, which is a continuing offence to which no time limit applies. But there is no evidence whatever of actual desertion by the husband. The only way in which any case could be made out would be that the acts of cruelty of the husband caused his wife to depart and so amounted to constructive desertion. But the respondent clearly cannot set up those acts, which she is too late to complain of specifically, by calling them constructive desertion: *Kay* v. *Kay*. (1)

H. Shanly for the respondent. The facts of the case

(1) (1912) 77 J. P. 128.

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amount to constructive desertion. Desertion by the husband is defined by Jeune P. in *Charter* v. *Charter* (1): "It is clear law that desertion by a husband does not necessarily mean that he has actually turned his wife out of doors. It is sufficient to constitute desertion if his conduct is such as to compel her to leave his house."

[He also referred to the recent case of *Pulford* v. *Pulford*. (2)]

Constructive desertion is an offence well known to this Court, and has always been regarded as a continuing offence, and as such comes within the power of the justices and the Summary Jurisdiction Acts.

HORRIDGE J. In this case a summons was taken out on April 10, 1924, by the wife against the husband on the ground that he had been guilty of persistent cruelty and had wilfully neglected to provide reasonable maintenance, and by such neglect had caused her to leave and live separately from him. A second summons was taken out on April 12, 1924, which charged the present appellant with having deserted his wife. When the hearing came on the first summons was abandoned, and the justices made an order upon the appellant on the ground that he had deserted his wife.

I deal first with what, in my view, is the true result of the evidence—that is, that the wife left and of her own accord on February 27, 1923, and the highest it can be put in her favour is that by a course of persistent cruelty he had caused her to do so. I am quite satisfied on the evidence that he never turned her out. It is quite true, as pointed out in *Charter* v. *Charter* (1) in the judgment of Sir Francis Jeune, that: "It is sufficient to constitute desertion if his conduct is such as to compel her to leave his house. The principle which underlies the cases is the intention of the husband to break off matrimonial relations," but he adds: "It is obvious that the wife went away of her own free will, and

(1) (1901) 84 L. T. 272, 273. (2) [1923] P. 18.

not because she was compelled to do so. The separation was not contrary to the wishes of the wife."

The question we have to consider is whether that desertion, which I will call for convenience constructive desertion, applies to a case under the Summary Jurisdiction (Married Women) Act, 1895. In order to ascertain that one must look at s. 4 of the Act, which enables these orders to be made under certain conditions. The conditions to which I need refer are those set out in the middle of the section: "or whose husband shall have deserted her." It is quite clear in this case that if the husband had actually turned the wife out the magistrates might have found desertion pure and simple, but, in order to find desertion, as they have done in this case, they relied on a course of cruel conduct which entitled her to leave, which is quite a different matter. The section continues: "Or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to live apart from him." Therefore, there are three matters to be dealt with: desertion pure and simple; failure to maintain causing her to leave; cruelty causing her to leave. And the offence of cruelty causing her to leave is an offence to which the six months limit applies, and, therefore, the proceedings in this case could not have been brought under that portion of the section, because the offence was completed on February 27, 1923, and the summonses were not taken out until April, 1924. The justices have endeavoured to get round the difficulty by virtually turning it into a summons for desertion, there being, to my mind, no evidence of desertion other than what I call constructive desertion, and that constructive desertion is dealt with by the other portion of the section, the remedy under which was barred by the six months' limit.

I think the decision in *Kay* v. *Kay* (1) is a direct authority to say that where the Summary Jurisdiction Act has provided

(1) 77 J. P. 128.

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a reason for making the order, but the remedy so far as that reason is concerned has been barred by the expiration of six months, you cannot then say: "I rely upon the same reason to constitute constructive desertion so as to bring it within the earlier portion of the section which deals with simple desertion as such," because the remedy for desertion by causing her to leave, whether by his failure to maintain or by his cruelty, has been barred by lapse of time. I think the language of the learned President in that case is quite clear: "The statute laid down that a charge of persistent cruelty causing a wife to leave and live separate and apart from her husband must be made without delay, and the proceedings taken within six months. The proceedings in the present case were not taken for more than twelve years. It appeared that the justices had endeavoured to find something which would justify them in making an order for maintenance notwithstanding the lapse of time." I think that that observation applies to this case, because desertion being a continuing offence the six months' limit does not apply to it. There was no evidence to support the finding of desertion, which is a different offence from persistent cruelty, and in this case it seems to me the whole case turned upon persistent cruelty causing her to leave and, therefore, it was barred by the six months' limit, and the justices could not turn it into the offence of desertion when there was no evidence of his having turned her out.

For these reasons I think the appeal must be allowed.

HILL J. I agree. In my view, there was no evidence here on which the justices could properly find that there was an intention of the husband to cause the wife to leave contrary to her wish. The evidence was that the wife left in consequence of the cruelty of the husband. Of that there is abundant evidence if it was accepted, as it was by the justices, but the summons was not on that ground, and it could not be on that ground, for more than six months had expired. If the wife had any remedy, it would seem to me to be to ask in this Court for a judicial separation on the

ground of cruelty, but that is a power which the justices cannot exercise. They can only make an order on the ground of persistent cruelty within six months of the date on which the wife is complaining.

I agree that the appeal ought to be allowed.

Solicitors for appellant: *Wilberforce Allen & Bryant.*
Solicitors for respondent: *Last, Riches & Fitton.*

J. R. B.

END OF VOL. AND OF PROBATE SERIES FOR 1924.

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